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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

LIFETIME DOORS, INC.,
Petitioner,

v.

BARBER & ROSS CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:
Donald F. Turner
2445 M Street, N.W.
Washington, D.C. 20037-1420
Telephone: (202) 663-6320

Patrick A. Moran*
Mary Lou Steptoe
Fredric A. Smith
SIMPSON & MORAN, P.C.
555 South Woodward
Fifth Floor
Birmingham, Michigan 48011
Telephone: (313) 642-2000
Attorneys for Petitioners
**Counsel of Record*

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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QUESTIONS PRESENTED

I. WHETHER SALES OF TWO PRODUCTS TOGETHER ARE BY THEIR VERY NATURE ILLEGAL RESTRAINTS OF TRADE IN THE ABSENCE OF:

A. PROOF OF SELLER'S MARKET POWER IN THE ALLEGED "TYING" PRODUCT; AND

B. PROOF OF SUBSTANTIAL FORECLOSURE IN THE ALLEGED "TIED" PRODUCT MARKET?

II. WHETHER SALES BROCHURES OFFERING TO MEET THE GENERAL NEEDS OF CUSTOMERS CONSTITUTE A SPECIFIC REQUIREMENTS CONTRACT SATISFYING THE STATUTE OF FRAUDS?

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Lifetime Doors, Inc. respectfully petitions this Court to issue a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered on January 30, 1987.

OPINIONS BELOW

The Jury Award of Damages and Judgment on Counts I-V filed on December 16, 1985 are set forth in Appendix A. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 810 F.2d 1276 and is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals below was entered on January 30, 1987. On April 21, 1987, Petitioner was granted an extension of time, until and including May 30, 1987 within which to file its Petition for Writ of Certiorari. The grant of extension of time is set forth in Appendix C. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1 (1982), sections 3 and 4 of the Clayton Act, 15 U.S.C. §§14, 15 (1982), and relevant provisions of the Virginia Antitrust Act, Va. Code §§59.1-9.1 *et seq.* (1982) and the Virginia Uniform Commercial Code, Va. Code §8.1-101 *et seq.* (1965 and Supp. 1985) are set forth in Appendix D.

STATEMENT OF THE CASE

A tying arrangement is a tandem sale — a marketing arrangement where the seller insists on selling two distinct products as a package. Until now, not every paired sale has been illegal. This Court has condemned tying arrangements under the antitrust laws only when the seller has sufficient market power in

the desired "tying" product to force its purchasers to buy the "tied" product from it as well. This Court has also required proof that the forced sales of the tied product had a substantial adverse effect upon competition in the tied product market.

The Fourth Circuit eliminated two critical elements of a tying violation. First, the Fourth Circuit eliminated discussion or proof of the seller's market power in the "tying" product. Under this precedent even the weakest competitor is liable for treble damages for selling two products as a package.

Second, the Fourth Circuit eliminated the need to prove harm to competition in the tied product market if sales by the accused seller of the "tied" product increase following its decision to sell two products as a package. Under this rule consumer acceptance of a paired sale — for whatever reason — exposes the seller to antitrust liability.

By ignoring this Court's tying decisions, the Fourth Circuit has announced a new rule: whenever the paired sale of two products results in increased sales of the tied product, the seller has engaged in illegal tying.

Lifetime Doors, Inc. ("Lifetime") is a manufacturer of several styles of doors, which it sells to various types of customers, including millworkers such as Barber & Ross Company ("B & R"). These millworkers place the doors in millwork packages which they in turn sell to new home and apartment builders. Each style of door faces different demand and supply cycles, and doors are typically sold in truck loads of mixed styles to accommodate the spectrum of customers' needs. This case concerns two styles of doors from Lifetime's product line: six-panel ("panel") doors (the alleged tying product) and flush doors (the alleged tied product).

In 1982, B & R became a Lifetime customer for flush doors, with an occasional order for panel doors. At this time and through at least December, 1984, B & R had other sources for panel doors. From March, 1983 to mid-May of that year, the Fourth Circuit found that B & R purchased both types of doors exclu-

sively from Lifetime, pursuant to an alleged oral agreement described below. Almost simultaneously, from late spring or early summer of 1983 on, industry demand for panel doors intensified. In May, 1983, Lifetime advised B & R that increased demand would limit its ability to supply panel doors. Acting upon Lifetime's advice, B & R began to purchase panel doors from other manufacturers in addition to Lifetime.

In mid-July, 1983, responding to the continuing shortage of panel doors, Lifetime instituted an allocation system selling packages of panel and other doors. The system was revised several times as Lifetime attempted to apportion its supply of doors fairly among steady and sporadic, old and new customers. Customers were limited to less than full truckloads of panel doors. To receive immediate delivery of a panel door order by a Lifetime truck, a customer could fill the partially loaded delivery truck with flush doors.[1] The panel door shortage was announced through Lifetime's customer newsletters and general sales brochures. Those publications encouraged sales through commonplace advertising assurances of "continuous production availability" and the like.

Under the allocation system, B & R elected to fill non-panel door space in its truck orders with flush doors, thus increasing its purchase ratio of flush to panel doors over that which existed just before the shortage. Although it was able to resell nearly every flush door it purchased from Lifetime, B & R was unhappy at its inability to get all the panel doors it wanted. The parties terminated their relationship in September, 1983. B & R was immediately able to fill almost all of its customers' demand for panel doors with either panel doors purchased from other suppliers or its

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[1]In July, William Gilbert, President of Lifetime Doors, limited the percentage of each style of panel door that could be placed on a truck. In August 1983, Gilbert placed a ceiling on the number of panel doors per order based upon each customer's immediate past purchases in June and July, 1983. When he realized that this rationing method froze out some good customers who had not bought in the last two months, Gilbert changed the base period for allocation calculations to the first six months of 1983. New customers were permitted the same allocation as customers whose panel door purchases had been 10% or less of their January-June, 1983 purchases.

self-developed Leesburg doors which were close substitutes for Lifetime's panel doors.

This controversy arose due to B & R's refusal to pay for a portion of the doors it ordered and received from Lifetime. Lifetime sued B & R for collection of that debt in state court.[2] B & R filed a separate state court action against Lifetime, alleging breaches of contract.[3] In addition, B & R filed this action in the United States District Court for the Eastern District of Virginia alleging violations of the Sherman and Clayton Acts, 15 U.S.C. §§1, 14, 15, violations of the Virginia Antitrust Act, Va. Code §§59.1-9.1 *et seq.* (1982), and various breaches of contract. Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. §1331. A jury verdict in favor of B & R on its claims was affirmed by the United States Court of Appeals for the Fourth Circuit.

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[2]Lifetime's collection suit was settled in September, 1985 when B & R paid the amount due.

[3]When B & R filed suit in federal court, it voluntarily nonsuited its contract claims and appended them to its federal antitrust claims.

REASONS FOR GRANTING CERTIORARI

I.

A WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S OPINION ELIMINATES TWO KEY ELEMENTS OF A TYING VIOLATION CONTRARY TO *JEFFERSON PARISH*

A. The Fourth Circuit Rule Would Hold That Even The Weakest Competitor's Sale Of Two Paired Products Violates The Antitrust Laws Whenever Sales Of The "Tied" Product Subsequently Increase.

The antitrust laws' long-standing prohibitions[4] against tying arrangements are intended to prevent a seller with market power over a desired product (the tying product) from forcing buyers to purchase another product (the tied product) as a condition to purchasing the desired product, resulting in foreclosed competition in the tied product market. This Court has said that a seller cannot force sales of the tied product unless it has a significant degree of economic power in the tying product market; consequently, evaluation of the seller's market power is a threshold step towards finding a tying violation. *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 12-14 (1984). As stated by the concurring opinion in *Jefferson Parish:*

> First, the seller must have power in the tying-product market. Absent such power tying cannot conceivably have any adverse impact in the tied-product market, and can only be procompetitive in the tying-product market.

Id. at 37 (O'Conner, J., concurring) (footnotes omitted).

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[4]Section 1 of the Sherman Act, ch. 647, §1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §1 (1982)) (contracts in restraint of trade); section 3 of the Clayton Act, ch. 323, §3, 38 Stat. 730 (1914) (current version at 15 U.S.C. §14 (1982)) (prohibiting sales on condition that the buyer not deal in goods of a competititor). *See also* Virginia Antitrust Act, Va. Code §§59.1-9.5 *et seq.* (1982).

The Fourth Circuit, however, did not require any *inquiry or proof whatsoever* into Lifetime's market power over panel doors, the alleged tying product, before finding an antitrust violation under a purported rule of reason analysis (the "Fourth Circuit Rule"). Although market power is a necessary ingredient in every case under the rule of reason[5] and although it is an element even in *per se* analysis of tying cases,[6] the subject of tying market power is not even mentioned in the Fourth Circuit's opinion. Moreover, the Fourth Circuit presumed anticompetitive effects in the "tied" product market merely because Lifetime's sales of the "tied" product increased after the alleged tying scheme was instituted.

Lifetime did not have enough market power to force sales of the "tied" product under traditional tests of market power reaffirmed by this Court. Moreover, this Court has stated:

> It is clear, however, that not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market.

Jefferson Parish, 466 U.S. at 11.

A seller can have significant market power in the tying product market if it (i) dominates the tying product market or (ii) offers a unique product that competitors are not able to offer. *Jefferson Parish*, 466 US. 2, 17 (1984); *see Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-13 (1953).[7]

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[5] *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986).

[6] *Jefferson Parish*, 466 U.S. at 12-14.

[7] "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *United States Steel Corp. v. Fortner Enterprises, Inc. ("Fortner II")*, 429 U.S. 610, 620 (1977).

1. The Fourth Circuit Rule Eliminates Judicial Inquiry Into A Seller's Market Power As An Element Of A Tying Violation.

The Fourth Circuit required no finding of Lifetime's share of the "tying" product market. The record contains conflicting market shares for Lifetime, ranging from 15% to 30.6% in 1983 and 14% to 24.9% in 1984. However, Lifetime would not have the market power required by traditional tying tests even under the highest set of market share numbers.

Under *Jefferson Parish* or *Times-Picayune,* Lifetime's market share would not constitute market power. *Times-Picayune* required near-monopoly power over the tying product to find a *per se* violation of Section 1 of the Sherman Act. A "mere" 40% share of the tying market was not large enough to wield the "monopolistic leverage" which is "the essence of illegality in tying agreements." *Times-Picayune,* 345 U.S. at 611. Moreover, that 40% share did not demonstrate the deleterious effects on competition required under a rule of reason analysis. *Id.* at 614-25. This Court quoted *Times-Picayune* with approval in *Jefferson Parish* while declining to infer significant market power from a 30% share of the tying market. In *Jefferson Parish,* the defendant hospital's position was "far from overwhelming" in the tying (general hospital services) market, since fully 70% of its potential users went to other hospitals in the area. *Jefferson Parish,* 466 U.S. at 26.

Moreover, Lifetime's market share decreased significantly from 1983 to 1984, which further negates market power.[8]

The unreliability of the Fourth Circuit Rule is shown when it attributes to a weakening competitor the strength to force sales.[9]

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[8]Taking the highest figures Lifetime's market share dropped from 30.6% in 1983 to 24.9% in 1984 — an absolute decrease of 18%.

[9]*See, e.g.,* Judge Easterbrook's opinion in *Ball Memorial Hospital,* 784 F.2d 1325 at 1334-35. *Cf. United States v. General Dynamics Corp.,* 415 U.S. 486 (1974) (in a changing market, past production statistics are not necessarily predictive of future competitive strength).

Lifetime did not hold market power under the market analysis for "unique" products. *See Jefferson Parish,* 466 U.S. at 17-18; *Fortner II,* 429 U.S. at 620-21. Lifetime possesses no special competitive advantages in the panel door market. Lifetime's panel doors are not unique. They are not protected by any legal,[10] physical[11] or production advantage.[12] In fact, B & R's own expert counted 27 other producers in the relevant marketplace, all of whom manufactured panel doors which were interchangeable with Lifetime's doors. Several millworker customers testified that they routinely purchase from more than one manufacturer. B & R's own history shows that it was able to find other sources for panel doors, both during and after its dealings with Lifetime. Quite simply, panel doors are standardized products.

Lifetime panel doors were neither more nor less desirable than any other panel doors in this standardized product market. Panel doors from every manufacturer were in high demand from early summer, 1983 through 1984. There were only three suppliers of panel door "skins", an essential input of the finished door, during that period. Each supplier had placed its customers including Lifetime on an allocated purchase system.[13] In turn, these customers — door manufacturers such as Lifetime — either put their customers on an allocated purchase system or announced their inability to fill all orders. It was this industrywide shortage, not any special economic power of Lifetime's, that temporarily frustrated B & R's limited efforts to find an alternate full require-

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[10]*See, e.g., United States v. Loew's, Inc.,* 371 U.S. 38 (1962).

[11]*See, e.g., Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 8 (1957) (land as a product has an inherent physical advantage).

[12]*See, e.g., Fortner Enterprises, Inc. v. United States Steel Corp. ("Fortner I"),* 394 U.S. 495, 505 (1969).

[13]Jeld-Wen, Masonite and Weyerhaeuser are the only producers of panel door skins in the world. Lifetime was not a customer of Jeld-Wen, which was refusing to take on new customers during the shortage. Accordingly, only the allocation policies of Masonite and Weyerhaeuser affected Lifetime. The actual number of panel skins available may not have decreased in absolute terms, but demand was rising so as to make previous supply levels inadequate.

ments supplier. In *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974), Justice,then Judge, Stevens noted:

> . . . the mere fact that lesser quantities were available for sale at higher prices would not limit the number of alternate sources which might reasonably be available to any firm desiring to obtain or retain a distributorship. Indeed, if anything, a significant increase in the price of the raw product would tend to diminish the significance of transportation costs, and thereby enlarge the geographical area in which distributors were effectively competing both in the purchase and in the sale of the product.

502 F.2d at 297-98.[14] Shortages commonly occur in competitive markets, but they do not create what can be called "market power."

Lifetime simply could not and did not exercise economic power over an alleged "tying" product market under the factual and legal analysis required by this Court's controlling precedent of *Jefferson Parish*. Lifetime had neither a unique product nor a sufficient market share from which to infer significant market

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[14]The *Mullis* plaintiff, a gasoline distributor terminated by ARCO during the 1973 oil crisis, canvassed some 20 other suppliers of petroleum products without finding one willing to serve him. There was no question but that ARCO's refusal to deal with him would drive him out of business. 502 F.2d at 292-93. By contrast, at no time during the panel door shortage was B & R unable to find a supplier. From May-December, 1983, after it stopped buying exclusively (and eventually altogether) from Lifetime, B & R bought panel doors from Michigan Birch, Crown Door, Morgan Distribution, Pacific Mutual, Walled Lake, and Woodland Industries. In 1984, B & R bought panel doors from Crown Door, Steve's Sash & Door and Walled Lake. *Central Chemical Corp. v. Agrico Chemical Co.*, 531 F. Supp. 533 (D.Md. 1982), follows the same reasoning as *Mullis*:

> Plaintiff was not foreclosed from seeking product from other producers. If those other producers had legitimate business reasons for not supplying plaintiff with material to replace that which Agrico did not supply, the Court is at a loss to understand why Agrico should be held responsible for those producers' independent exercise of business judgment. There is no reason to believe that the other producers would have been oblivious to an offer for scarce materials which was significantly more attractive than that of its regular customers.
>
> 531 F. Supp. 551.

power over panel doors. Lifetime could not be labeled a monopoly under traditional tying principles. The Fourth Circuit Rule is defective in holding that illegality can be found without proof of market power.

2. The Fourth Circuit Rule Disregards This Court's Requirement Of A Thorough Review Of Competitive Effects In The Tied Market.

The rule of reason requires proof that the tying arrangement caused substantial foreclosure in the tied product market. However, the Fourth Circuit Rule substituted mere proof of increased sales of the tied product for this essential element of the rule of reason. In fact, the Fourth Circuit devoted only *three sentences* in its opinion to market conditions in the tied (flush door) market.[15]

The court adopted the presumption of B & R's expert that the relevant geographic market for flush doors was the same as that of the panel door market. *Jefferson Parish* expressly cautions against such presumptions. 466 U.S. at 29. Without a geographic reference for the tied market, it is impossible to calculate the proportion foreclosed, much less state that the degree of foreclosure was unreasonable.[16] Without proof of substantial foreclosure, no anticompetitive effect should be presumed.[17]

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[15]Slip Op., Appendix B at 10a 11; 810 F.2d at 1280.

[16]"[A]n antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961):

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effect which pre-emption of that share of the market might have on effective competition therein.

Id. at 329.

[17]*Jefferson Parish*, 466 U.S. at 35-36 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J. concurring).

The Fourth Circuit Rule does not require a traditional market analysis. Instead, the Rule presumes that the allocation system had anticompetitive effects. The Fourth Circuit assumed a direct causal link between the allocation system and an increase in Lifetime's sales of the alleged "tied" product:

> [E]vidence that Lifetime significantly increased its sales of flush doors after it imposed the tying arrangement, even though the market was in a state of decline, demonstrated that Lifetime had increased its market share.[18]

Since an increase in market share by itself is not anticompetitive[19], the court apparently inferred that Lifetime increased its market share of the tied product due to the operation of its allocation system. The court's conclusion rests on unsupported assumptions: first, that Lifetime's increased flush door sales translate into increased market share; and, second, that Lifetime's increased flush door sales are linked to its allocation system.

Increasing sales can indeed be synonymous with a growing market share in a declining market. However, despite the appellate court's statement, there is no proof in this record that the flush door market was in a state of decline. Just as there are no geographic bounds to the market in the record, there are no statistics for the universe of flush door sales.[20] Consequently, the appellate court cannot demonstrate that Lifetime's increased flush door sales actually translate into increased market share.

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[18]Slip Op., Appendix B at 10a; 810 F.2d at 1280.

[19]*Ball Memorial Hospital*, 784 F.2d at 1335.

[20]B & R's expert *assumed* that flush door sales were declining in direct proportion to housing starts which were decreasing during 1983-84. He did not explain why sales of flush doors and housing starts should march in lockstep ratio. Changes in demand for certain styles of housing could cause changes in demand for different door styles, regardless of the overall number of houses built. For example, increased sales of flush doors may indicate purchasers' attempts to substitute for panel doors during the panel door shortage. Moreover, B & R's expert did not factor in the separate demand swings of the apartment and the replacement door markets, accounting for at least 25% of all flush door sales.

The overall door manufacturing market is quite cyclical. Even the limited evidence in this record demonstrates both entry and exit due to market forces unconnected with Lifetime's conduct.[21] The Fourth Circuit Rule improperly infers anticompetitive effects from the growth in Lifetime's market share without even knowing whether and why Lifetime's competitors lost market share.

There is nothing in the opinion to connect any increase in Lifetime's share of the flush door market to any measurable foreclosure effects of its allocation system. In short, from an unspecified increase in an unstated market share in an undefined market, the Fourth Circuit has created a rule which infers antitrust injury from tying arrangements.

B. The Fourth Circuit Rule Establishes Presumptive Illegality Of Tied Sales.

The rule of reason requires proof that the seller had enough power in the tying product to substantially affect the tied product market and that such adverse impact actually took place. If the seller could not or did not substantially foreclose the tied product market, there has been no unlawful exploitation of market power under the rule of reason and consequently no violation of the antitrust laws. The Fourth Circuit Rule effectively removes *both* threshold criteria from tying analysis, and since tying arrangements typically increase sales of the tied product, the Rule makes them presumptively unlawful, shifting the burden of proof to the defendant-seller to prove that its sales were *not* an illegal tie.

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[21] In the panel door market, for example, there was a 22.2% net loss of market share for the first six months of 1983 — *before* Lifetime set up its allocation system. Four manufacturers left the market, and fifteen others lost some amount of share. Obviously, any increase in Lifetime's panel door market share which stems from taking up these companies' business is completely benign and unrealted to the alleged anticompetitive tie. To the extent that any of these competitors manufactured flush doors (and fifteen of them did, accounting for 12.6-12.9% of the loss), the same is true for the flush door market.

II.

THE COURT OF APPEALS ERRED IN FINDING A REQUIREMENTS CONTRACT SUPPORTING AN ANTITRUST DAMAGE AWARD BASED SOLELY UPON ADVERTISING IN GENERAL SALES BROCHURES THAT THE SELLER COULD MEET A PURCHASER'S NEEDS

The Fourth Circuit has placed every businessman who distributes sales literature at risk of an antitrust verdict. To uphold the jury's antitrust[22] and contracts damage awards, the courts below found that written sales brochures widely distributed to customers of Lifetime evidenced a requirements contract between Lifetime and a customer which satisfied the statute of frauds. It is now the law in the Fourth Circuit that the phrase "assured monthly production," appearing in a brochure to increase membership in a "VIP Club" creates a requirements contract sufficient to support an antitrust damage award. The dramatic deterrent effect of the antitrust laws was never meant to chill salesmen's puffery and expose legitimate businesses to treble damage awards.

B & R alleges that a specific oral requirements contract existed wherein Lifetime committed to supply B & R's monthly needs of panel doors. As an oral contract has been alleged for the sale of goods for $500 or more, the parties agree that the Uniform Commercial Code as enacted in Virginia provides the governing statute of frauds. Va. Code §8.2-201 (1965).

The statute of frauds disallows proof of oral contracts without written substantiation. It requires a writing that: (1) evidences that a contract for the sale of goods has been made between the parties; (2) is signed by the party against whom

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[22]The Fourth Circuit affirmed the trial court's award of treble damages without specifying which portion, if any, of B & R's losses coincided with the harm to competition which is the hallmark of antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

enforcement is sought; and (3) specifies a quantity. Va. Code §8.2-201(1)(1965). Failure to satisfy the statute of frauds prevents the alleged contract from being enforced. Va. Code §8.2-201 Official Comment(4)(1965).

The Fourth Circuit specifically found that "[t]he written sales brochures given by Lifetime to B & R met the requirements of the statute of frauds." Slip Op., Appendix B at 11a; 810 F.2d at 1280. The Court's holding is contrary to law, logic and plain common sense and will lead to massive "discovery" of requirements contracts that sellers did not intend to offer.

The courts relied upon *three* documents to satisfy the writing requirements of the statute of frauds: two newsletters (Editions Nos. 1663 and 2253) and the Lifetime VIP Club brochure.[23] The newsletters are intended for wide distribution to enhance Lifetime's sales — not to define the terms of any contract between Lifetime and a particular customer. The newsletters do not mention price, terms of sale, duration or any other elements essential to a particular contract. Indeed, the newsletters themselves point to supply problems in the panel door market.

The VIP Club brochure is sales literature designed to introduce prospective customers to the benefits of participating in the outlined purchasing program. The brochure is replete with sales puffery, including a reference to "assured monthly production."

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[23]The three documents are included in Petitioner's Appendix. The VIP Club brochure, which provides the lone reference to "assured production" is not signed by Lifetime, the party against whom enforcement is sought. The term "signed" includes "any symbol executed or adopted by a party with a present intention to authenticate a writing." 2 A. Corbin, Corbin On Contracts §210 (1981); Va. Code §8.1-201, Official Comment 39 (1965 and 1985 Supp.). Without any analysis, the Fourth Circuit contended that Lifetime Doors' trademark was sufficient to authenticate the documents. Slip Op., Appendix B at 11a; 810 F.2d at 1280. However, the question is *not* whether Lifetime intended to authenticate its sales literature. Rather, it must be proven that Lifetime placed its logo on the documents with the present intent to enter into a requirements contract with B & R. B & R presented no evidence that Lifetime attached its logo to enter into a contract with B & R. Nor is there any case law to support the proposition that "letterhead" imprinted on widely distributed sales literature constitutes a signature.

See Appendix E. This phrase does not show a commitment to supply all of any specific customer's needs nor does it guarantee a source of materials or supplies. Rather, the brochure speaks of Lifetime's general capabilities in such terms as "continuous production availability," "production time" and a "production cycle."

No cases support B & R's proposition that sales literature which is widely distributed and not directed at one particular customer constitutes a writing sufficient to satisfy the statute of frauds. However, case law to the contrary exists. *Embedded Moments, Inc. v. International Silver Co.*, 648 F. Supp. 187 (E.D.N.Y. 1986).[24] The sales literature distributed by Lifetime was not directed at B & R or any other specific customer. Taken to its logical conclusion, the Fourth Circuit would hold that Lifetime has a requirements contract with *every* company that received the brochure and newsletter. That establishes a rule of law that would create unintended contractual obligations doomed to failure.

Moreover, before a requirements contract can exist, the buyer (B & R) must agree to purchase *its* requirements exclusively from the seller (Lifetime). *Mason v. United States*, 615 F.2d 1343, 1346 n.5 (Ct.Cl.), *cert. denied*, 449 U.S. 830 (1980).[25]

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[24]In *Embedded Moments* the plaintiff attempted to combine a memorandum written by defendant with one of defendant's sales catalogues to satisfy the statute of frauds under New York's Uniform Commercial Code. The internal memorandum specified all essential terms of a contract with plaintiff except for quantity. Plaintiff, therefore, argued that defendant's sales catalogue, which listed the quantity available at 2,500 could supplement the memo and satisfy the statute of frauds. The court disagreed.

Observing that the sales catalogue was directed to all of defendant's potential customers and listed other items for sale, the court held that the catalogue could not be used in conjunction with the memorandum. The court reasoned that absent a reference to the particular contract at issue, the catalogue "is wholly unrelated to the purported agreement between plaintiff and defendant." 648 F. Supp. at 192.

[25]Indeed, it is this promise of exclusivity that provides the mutuality of obligation necessary to make the agreement an enforceable contract. *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1121 (5th Cir. 1985) (*per curiam*).

B & R failed to demonstrate any language in the writings evidencing B & R's obligation to buy exclusively from Lifetime. This alone prevents B & R from establishing the existence of a requirements contract which satisfies the statute of frauds.[26]

Sales literature, aimed at all customers, cannot provide the link to an oral contract with a particular customer as a matter of law. Without adequate analysis, the Fourth Circuit has created a rule of law with disastrous consequences. Sales literature containing puffery can be used as a benchmark for treble damages under the antitrust laws. Such a result is both unwarranted and unwise.

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[26]The sales literature does not identify B & R as a party to a contract as required by the Virginia UCC. *See* Va. Code §8.2-201(1). The sales literature does not show a commitment by Lifetime to supply B & R's needs. The sales literature does not contain any essential contractual element.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectively Submitted,

Patrick A. Moran*
Mary Lou Steptoe
Fredric A. Smith

SIMPSON & MORAN, P.C.
555 South Woodward
Fifth Floor
Birmingham, Michigan 48011
Telephone: (313) 642-2000

Attorneys for Petitioners

*Counsel of Record

Of Counsel:
Donald F. Turner
2445 M Street, N.W.
Washington, D.C 20037-1420
Telephone: (202) 663-6320

Dated: May 30, 1987

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

LIFETIME DOORS, INC.,
Petitioner,

v.

BARBER & ROSS CO.,
Respondent.

APPENDIX

Of Counsel:
Donald F. Turner
2445 M Street, N.W.
Washington, D.C. 20037-1420
Telephone: (202) 663-6320

Patrick A. Moran*
Mary Lou Steptoe
Fredric A. Smith
SIMPSON & MORAN, P.C.
555 South Woodward
Fifth Floor
Birmingham, Michigan 48011
Telephone: (313) 642-2000
Attorneys for Petitioners
**Counsel of Record*

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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APPENDIX A
Jury Damage Award And Judgment

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

BARBER & ROSS COMPANY,
Plaintiff.

V. CIVIL ACTION NO. 85-650-A

LIFETIME DOORS, INC.,
Defendant.

We, the jury, award damages as follows:

On the antitrust claim we award $730,148.00.

On the requirements contract claim we award $728,597.00.

Is there any amount in the above damage award which is included in both, that is, is there any overlapping of damages? YES (answer yes or no).

If the answer is yes, what amount is included in both the antitrust award and the contract award? $728,597.00

(s) Susan Gorsky
Foreman

December 16, 1985.

APPENDIX A
Jury Damage Award And Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JUDGMENT IN A CIVIL CASE

BARBER & ROSS CO.

V.

Case Number:
C/A85-0650-A

LIFETIME DOORS, INC.

☒ **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

☐ **Desicion by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, Barber & Ross Co., against the defendant, Lifetime Doors, Inc., on Counts I through IV (antitrust claim) in the amount of $730,148.00 trebled to $2,190.444.00 and, as a part of said $730,148.00, judgment on Count V (requirements contract claim) in the amount of $728,597.00 in accordance with the verdict of the jury.

Date December 16, 1985 *Clerk* W. FARLEY POWERS, JR.

(s)
(By) Deputy Clerk

APPENDIX B
Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1535(L)

Barber & Ross Co.,
Appellee,
versus
Lifetime Doors, Inc.
Appellant.

No. 86-1538

Barber & Ross Co.,
Appellant,
versus
Lifetime Doors, Inc.
Appellee.

Appeals from United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief Judge. (CA 85-0650-A)

Argued: November 12, 1986 Decided: January 30, 1987

BEFORE WINTER, Chief Judge, HALL, Circuit Judge, and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

E. Barrett Prettyman, Jr. (Susan S. DeSanti; Meg Hackett Carrier; Hogan & Hartson on brief) for Appellant: Steven R. Kuney (David Povich; Mark S. Levinstein; Cherry Joy Beysselance; Williams & Connolly on brief) for Appellee.

WINTER, Chief Judge:

APPENDIX B
Opinion of the Court of Appeals

Defendant Lifetime Doors, Inc. (Lifetime) appeals from a judgment entered by the district court on a jury verdict in favor of plaintiff Barber & Ross Co. (B & R) for $2.1 million. The jury found for B & R on its claims of antitrust violations and breach of contract. As a prevailing plaintiff in an action under the Clayton Act, B & R subsequently submitted an application for attorneys' fees and costs of suit, including a request for expenses arising from its use of expert witnesses. The district court denied B & R's request for expert expenses and B & R cross appeals from that ruling.

We conclude that there was sufficient evidence to support the jury's verdict based on the antitrust violation and the breach of contract claim. We also conclude that the district court acted within its discretion in denying the request for expert expenses. We therefore affirm.

I.

B & R's business is the purchase of millwork products, including doors, from manufacturers, preparation of them for installation in new homes, and sale of them to new home builders, primarily in the state of Virginia. Lifetime is a large manufacturer of doors, including plain rectangular doors, known as flush doors, and doors with molded hardboard outer layers, known as six-panel doors, common in Colonial style homes. In 1982, B & R began to buy flush doors and six-panel doors from Lifetime to include in its millwork packages.

Taking the evidence in the light most favorable to B & R, the prevailing party, there was the following proof regarding the course of dealing between B & R and Lifetime. In early 1983, a sales representative for Lifetime approached B & R to urge B & R to shift all its door purchases to Lifetime so as to constitute Lifetime its exclusive supplier. The sales representative provided B & R with sales literature which offered prospective purchasers the opportunity to join Lifetime's VIP Club. These writings

APPENDIX B
Opinion of the Court of Appeals

promised new purchasers "continuous production availability . . . in full proportion to monthly needs" which would ensure that purchasers could "order flexible quantities" in shipments of a "desired number." The President of B & R secured an oral commitment from Lifetime that Lifetime would supply B & R's requirements of four truckloads of six-panel doors each month, in return for which B & R would purchase doors exclusively from Lifetime. The oral agreement was made in Virginia where B & R conducts most of its business.

From the middle of March to the middle of May of that year, B & R purchased both flush and six-panel doors exclusively from Lifetime pursuant to their agreement. In May, B & R began to purchase six-panel doors from other manufacturers after Lifetime advised B & R that a shortage of six-panel doors would limit Lifetime's ability to supply B & R with six-panel doors and suggested that B & R make purchases from other suppliers. Then in July, Lifetime instituted an "allocation system" which tied the number of six-panel doors a customer could purchase to the number of flush doors that the customer bought. Lifetime's president told his sales people that Lifetime was no longer willing to sell six-panel doors to customers that bought their flush doors from competitors.

Lifetime's decision to tie sales of flush doors to sales of six-panel doors forced its customers substantially to alter the mix of flush and six-panel doors that they purchased. By August, the allocation system was forcing B & R to purchase three flush doors for each six-panel door that it ordered. Moreover, this pattern of increased purchases of flush doors from Lifetime occurred at a time when the demand for flush doors was declining.

Lifetime informed its customers that the reason for its new allocation system was a shortage of the hardboard outer layers (skins) which were necessary for the manufacture of six-panel doors. B & R presented evidence that no shortage actually

existed. Lifetime actually possessed a greater number of skins than it had historically ordered from its own supplier. Lifetime held back thousands of six-panel doors from the market while it told customers that a shortage of doors required it to tie sales of flush doors to sales of an allegedly limited supply of six-panel doors.

In September, 1983, the parties terminated their relationship. Lifetime contended that it ceased shipping doors to B & R when B & R stopped paying its bills for past shipments. B & R's President testified that Lifetime refused to ship further quantities of six-panel doors to B & R after B & R threatened to file suit to challenge the allocation system. B & R also contended that Lifetime refused to deal further with B & R because Lifetime needed to use its supplies of six-panel doors to force other customers, including prospective new customers, to purchase more flush doors. Thus, Lifetime terminated the contractual relationship with B & R as a direct consequence of Lifetime's anticompetitive allocation system.

During the damage phase of the trial, B & R provided evidence that the allocation system had a deleterious effect on its business. Lifetime's policy of tying sales of flush doors to those of six-panel doors caused B & R to purchase flush doors it did not need. As a result, B & R was forced to pay for storage of flush doors until they could be used. In addition, B & R received significantly fewer six-panel doors than it needed during July and August. After its contract with Lifetime was terminated, B & R received no more six-panel doors from Lifetime. Despite B & R's attempts to mitigate losses, it was forced to deliver many of its millwork packages without six-panel doors that its customers had ordered. Some of B & R's customers cancelled their orders when this happened and began purchasing packages from other millwork suppliers.

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Opinion of the Court of Appeals

Based on these facts, the jury awarded B & R $728,597 on its claim that Lifetime breached the requirements contract between the parties. In addition, the jury awarded B & R $730,148 on its claim that Lifetime had established an anticompetitive tying arrangement that amounted to a per se violation of the antitrust laws and a violation of the antitrust laws under the rule of reason. The latter award was trebled pursuant to the damage provisions of the Clayton Act. These awards overlapped because the damages from both claims depended primarily on Lifetime's decision to terminate its supplier relationship with B & R so that the actual verdict was $2.1 million.

II.

Initially, Lifetime challenges the verdict of the jury on the grounds that B & R lacked standing under the antitrust laws to assert its antitrust claims. Lifetime premises its argument on two contentions. First, Lifetime argues that a purchaser of a tied product—here flush doors are the tied product and six-panel doors the tying product—who is not a consumer in the tied-product market lacks standing to sue for damages due to excess purchases of the tied product because this injury does not flow from an injury to competition. Second, Lifetime contends that B & R's claim that Lifetime's refusal to deal was pursuant to its anticompetitive scheme was too attenuated to support standing under the antitrust laws. We think that neither of these contentions has merit.

To bring a claim under the antitrust laws, a plaintiff must assert an "injury" in his business or property by reason of any thing forbidden in the antitrust laws." 15 U.S.C. § 15; Cargill, Inc. v. Monfort of Colorado, Inc., ____U.S.____, 55 U.S.L.W. 4027 (December 9, 1986); Associated General Contractors, Inc. v. Carpenters, 459 U.S. 519, (1983); Brunswick v. Pueblo Bowl-o-Mat, 429 U.S. 477 (1977). A consumer in the tied product market who is forced to purchase unwanted supplies of the tied

product in violation of the antitrust laws is unquestionably the victim of an antitrust injury. Fortner Enterprises v. U.S. Steel Corp. (*Fortner* I), 394 U.S. 495, 498-99 (1969). *See* Statement of Rep. Mitchell, 51 Cong. Rec. 9090 (1914) ("[The Clayton Act] seeks to prevent exclusive 'tying' arrangements that have brought about a monopoly, alike injurious to the small dealers, to the manufacturers, . . . to those who seek to enter the field of competition and to the millions of consumers.") Most recently, in Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the Supreme Court reiterated that purchasers of a tied product are injured when an illegal tie coerces the buyer into "the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Hyde, 466 U.S. at 12-13 & n.19. Thus, B & R had standing under the antitrust laws because B & R established that it was forced to buy unwanted supplies of flush doors.[1]

A plaintiff may also bring an antitrust claim where the plaintiff has been injured because of a seller's refusal to deal with a buyer where this refusal furthers an anticompetitive tying arrangement. Osborn v. Sinclair Refining Co., 324 F.2d 566, 571-73 (4 Cir. 1963). A buyer who is injured due to a refusal to deal

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[1]Lifetime contends that when B & R purchased flush doors that it would not otherwise have bought, there was no adverse effect on competition, citing *Hyde*, 466 U.S. at 16. B & R, however, was a regular purchaser of flush doors and was foreclosed from purchasing such doors from suppliers other than Lifetime due to Lifetime's tying arrangement. Even if B & R's purchases did not have an adverse effect on competition, B & R was nonetheless injured under the antitrust laws. As the passage from *Hyde* which Lifetime relies on suggests, the lack of an anticompetitive effect of a forced purchase on a purchaser may have a bearing on whether the tying arrangement has had a substantial effect on commerce, a threshold requirement of per se condemnation. An anticompetitive effect is not a threshold requirement, however, for a purchaser to have *standing* under the antitrust laws. Blue Shield of Virginia v. McCready, 457 U.S. 465, 481-82 (1982). It is beyond dispute that a consumer in the market in which trade is illegally restrained who is injured by anticompetitive practices has standing to bring an antitrust claim. *Associated General Contractors*, 459 U.S. at 539.

in furtherance of the seller's anticompetitive scheme has been injured as a direct result of an antitrust violation. *Id.* Such a party is in a position similar to the comsumer in Blue Shield of Virginia v. McCready, *supra*, who was injured under the antitrust laws when he was denied a claim for insurance benefits to pay for psychological services pursuant to an anticompetitive scheme to promote psychiatric services. *See also* Graphic Products Distributor, Inc. v. Itek Corp., 717 F.2d 1560 (11 Cir. 1983) (antitrust injury from a contract termination pursuant to an illegal scheme); Eiberger v. Sony Corp. of America, 622 F.2d 1068 (2 Cir. 1980) (same); Arnott v. American Oil Co., 609 F.2d 873 (8 Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (same).

Lifetime's allocation system was only a slight variation on anticompetitive refusals to deal which have been condemned previously. Lifetime employed its allocation system to restrict the sales of six-panel doors in order to increase sales of flush doors to B & R and other purchasers. B & R was unable to purchase sufficient quantities of six-panel doors due to its unwillingness to purchase the requisite number of flush doors. When B & R questioned the legality of Lifetime's allocation system, Lifetime terminated the requirements contract between the parties in order to effectuate its illegal arrangement. As a result, Lifetime's refusal to deal was an injury to B & R for purposes of antitrust standing.[2]

III.

The jury found separate violations of the antitrust laws based on claims that Lifetime's tying arrangement were per se illegal and a violation under the rule of reason. We need not decide whether the defendant's allocation scheme was per se illegal,

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[2]The district court properly instructed the jury on its obligation to find an antitrust injury in order to return a verdict of liability during the liability phase of the trial. It was not prejudicial to Lifetime when the district court omitted providing a specific instruction that a refusal to deal constitutes an antitrust injury.

because adequate evidence supported the jury's conclusion that the allocation system unreasonably restrained competition. B & R met its burden under the rule of reason of demonstrating the actual effect of the tying arrangement on competition. *Hyde*, 466 U.S. at 29. B & R's expert testimony established the relevant geographic market for flush and six-panel doors. Once the relevant market was established for flush doors, evidence that Lifetime significantly increased its sales of flush doors after it imposed the tying arrangement, even though the market was in a state of decline, demonstrated that Lifetime had increased its market share. In addition, B & R presented evidence that Lifetime's stated justification for its allocation scheme — a shortage of six-panel doors — was a pretext for its anticompetitive intentions. Thus, B & R presented sufficient evidence to demonstrate that Lifetime's tying arrangement unreasonably restrained competition in the market for flush doors.

IV.

Lifetime contends that there was insufficient evidence to support the jury's breach of contract verdict because the alleged contract was unenforceable under the statute of frauds and because there was insufficient evidence that an oral agreement to form a requirements contract had been reached. These contentions also fail to persuade us that the jury's verdict must be overturned.[4]

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[4]Lifetime points out that because the antitrust damage award depended primarily on termination of the contract with B & R (the refusal to deal), overturning the jury's verdict on the contract issues would also require reversal on the issue of antitrust damages. Even absent a legally enforceable requirements contract, however, B & R still presented sufficient evidence to demonstrate that Lifetime would have supplied substantially all of B & R's needs under a competitive allocation system. In fact, Lifetime in its memorandum in support of defendant's motion for judgment notwithstanding the verdict characterized B & R's evidence as demonstrating that under its agreement with Lifetime B & R would purchase a "large percentage of its needs from Lifetime," and Lifetime would fill all of the orders submitted by B & R for six-panel doors.

APPENDIX B
Opinion of the Court of Appeals

Under the Virginia statute of frauds, an enforceable contract for the sale of goods must be evidenced by a writing that indicates that the parties formed a contract signed by the party against whom enforcement is sought. Va. Code. § 8.2-201. The contract is not enforceable beyond the quantity of goods shown in writing. *Id.*

The written sales brochures given by Lifetime to B & R met the requirements of the statute of frauds. The writings met the signature requirement because the Lifetime Doors trademark appeared on the documents and that was sufficient to authenticate the documents. Va. Code § 8.1-201 (39). The writings also stated a sufficiently definite quantity for purposes of the statute because they referred to meeting the purchaser's needs. Va. Code § 8.2-306 & official comment.

To avoid the proscription of the statute of frauds, a writing must provide "a basis for believing that the offered oral evidence rests on a real transaction." Va. Code § 8.2-201, official comment No. 1. The writing need not, however, conclusively establish the existence of a contract to survive the scrutiny of the statute of frauds. *Id.* The writings in this case promised that Lifetime would meet the monthly needs of B & R and thus were sufficient to support B & R's claim that an oral agreement was reached to form a requirements contract.

The evidence was sufficient to support the jury's verdict that such an oral agreement was reached. The testimony from the President of Lifetime indicated that at the initial meeting between the parties, the subject of the requirements contract was discussed. At a later meeting, the parties reached an agreement to form a requirements contract. There were some discrepancies in the testimony of B & R's witnesses, but their testimony was sufficiently consistent on the content of the meetings between

Lifetime and B & R to support the jury's award.[5] Lifetime contested these claims, but the jury resolved the conflicts in the evidence and found that Lifetime had promised to meet all of B & R's needs for six-panel doors.

V.

Once a plaintiff has demonstrated that he has been injured due to an antitrust violation, the plaintiff may prove the extent of damages under a relaxed standard of proof. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981). The courts have relaxed the standards for proving damages in antitrust cases because estimates of the extent of damage depend on reasonable projections of the position of the plaintiff's business in the absence of the antitrust violation. In addition, courts have noted that a wrongdoer should not insist on certain proof of the extent of an injury which the wrongdoer has caused. *Id.* We find that B & R's evidence met this standard of proof.

B & R presented expert testimony which supported its estimate of the extent of damages. For an estimate of the damages for 1983, records of B & R's projects, which were admitted into evidence, allowed the expert to identify the actual number of projects which were cancelled by customers because they did not receive six-panel doors. The 1984 estimate required more ingenuity. The estimate for damages to B & R depended on the expert's

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[5]Lifetime also contends that the district court should have instructed the jury on the issue of whether Lifetime gave notice that it intended to terminate the contract. Va. Code §§ 8.2-309; 8.1-201. We agree with the district court that Lifetime's alleged notice was too equivocal to support a contention that it had validly terminated the contract. In addition, omission of this instruction was not prejudicial to Lifetime because a termination that is otherwise valid under Va. Code §§ 8.2-309 may still be unreasonable under the antitrust laws.

The district court also did not err by rejecting an instruction on the issue of consequential damages because the relevant provisions limiting damages were not contained in the requirements contract.

assessment that B & R lost business because customers who cancelled orders in 1983 never returned. B & R introduced evidence from its salesmen and project records to support this premise. The expert tailored his methodology in a reasonable manner to the evidence in the case in order to take account of the business that was lost to B & R.[6] *See* Pierce v. Ramsey Winch Co., 753 F.2d 416, 439-441 (5 Cir. 1985); E. Berger v. Sony Corp. of America, 622 F.2d 1068 (2 Cir. 1980).

The estimates for 1984 assumed that all of the customers who left B & R in 1983 would have continued as customers of B & R in the absence of the antitrust violation. Thus, the plaintiffs estimates were generous, but not speculative. Moreover, the expert's projections were conservative in the sense that they omitted customers that were lost after 1983 and potential new customers that could not be serviced. The damage estimates were thus reasonable under the circumstances of the case.

VI.

B & R, as a prevailing party under § 4 of the Clayton Act, cross appeals because the district court denied its claim for the costs of expert witnesses. Under § 4 of the Clayton Act, a prevailing party is entitled to recover "the costs of suit and a reasonable attorney's fee." 15 U.S.C. § 15. We agree with the prevailing view that "costs of suit" under § 4 does not include expert expenses except in cases of exceptional circumstances. *E.g.*, International Woodworkers of America, AFL-CIO v. Champion International Corp., 790 F.2d 1174 (5 Cir. 1986); Illinois v. Sangamo Construction Co., 657 F.2d 855 (7 Cir. 1981). *But see* J.T. Gibbons v. Crawford Fitting Co., 760 F.2d

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[6]Based on 1983 figures, the expert calculated that each developer/customer of B & R produced twenty-five houses a month that would have been supplied by B & R. Based on that figure, the expert used the average price of B & R's packages to calculate lost sales. Using B & R's past profit rates, the expert derived a final figure for lost profits.

613 (5 Cir.), *cert granted,* 55 U.S.L.W. 3383 (Dec. 1, 1987).[7] We adhere to the view that where Congress has desired that such expenses be recoverable, they have specifically authorized such recovery. International Woodworkers, *supra,* 790 F.2d at 1179 & n.7; Wheeler v. Durham City Board of Education, 585 F.2d 618, 624 (4 Cir. 1978).

A district court's decision as to whether exceptional circumstances justify an award of expert expenses is a matter of discretion. *E.g.,* Roberts v. S. S. Kyriakoula v. Lemos, 651 F.2d 201, 206 (3 Cir. 1986). We find no basis under the circumstances of this case for concluding that the district court abused this discretion.

AFFIRMED; COSTS ASSESSED AGAINST LIFETIME DOORS, INC.

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[7] *Gibbons* holds that a district court has *no* authority to award expert witness fees as costs of suit under § 4. 760 F.2d at 617. Although we disagree with this holding, we need not reach the issue because the district court chose to exercise its discretion to reject an award of expert expenses.

APPENDIX C
Order Extending Time To File
Petition For Writ of Certiorari

Supreme Court of the United States

No. A-763

LIFETIME DOORS, INC.,
Applicant,

v.

BARBER & ROSS CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 30, 1987.

(s)William H. Rehnquist
Chief Justice of the United States

Dated this 21st
day of April, 1987.

APPENDIX D
Relevant Provisions of the Statutes Involved

Section 1 of the Sherman Act [15 U.S.C. § 1 (1982)]

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 3 of the Clayton Act [15 U.S.C. § 14 (1982)]

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to sub-

stantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Act [15 U.S.C. § 15 (1982)]

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

APPENDIX D
Relevant Provisions of the Statutes Involved

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

The Virginia Antitrust Act [Va. Code §§ 59.1-9.1 *et seq.* (1982)]

§ 59.1-9.5. Contracts, etc., in restraint of trade unlawful.—Every contract, combination or conspiracy in restraint of trade or commerce of this State is unlawful.

§ 59.1-9.17. Construction of chapter.—This chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions.

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Va. Code § 8.2-201 (1965)

§ 8.2-201. Formal requirements; statute of frauds. —(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

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(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (§ 8.2-606).

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PLAINTIFF'S EXHIBIT 71

LIFETIME
— VIP —
CLUB

An elite nationwide membership
of door distributors and prehangers.

MEMBERSHIP
PRIVILEGES

Confidential distribution for VIP Club Members Only

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VIP CLUB PRIVILEGES

•

GUARANTEED FIRM PRICES *PRICE*

Firm prices for the duration of each month will be issued during RSVP week to VIP Club members, one (1) week prior to each new business month. Such prices are generally renewable from month to month, but subject to occasional change *if* any unusual market advance or decline occurs.

The monthly firm price provides VIP Club members the ability to "pass-thru" similar price stability to their trade.

•

"PURCHASE DISCOUNT" *PRICE*

Monthly VIP placements are subject to an *extra* 10¢ per door discount off regularly quoted price ($100.00 prox per TL). This "Purchase Discount" is off the regularly quoted price and is for VIP Club members only and not available to others.

•

"CASH CERTIFICATE" PAYMENT AWARD *PRICE*

A $100.00 TL "CC" (Cash Certificate) is issued per each VIP TL shipped in one month and then paid for within the next VIP month. Each "CC" is redeemable within the following VIP month upon payment for a corresponding truckload. Issuance and redemption of each $100.00 "CC" is subject to full and timely discounted invoice payment.

"ONE STOP-NO SHOP" TIME SAVER •
PRICE/SERVICE

Order FLEXIBLE QUANTITIES only once monthly at COMPETITIVE FIRM PRICES. No time loss for individual truckload shipping during the month. Utilize the following procedure:

APPENDIX E
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a) During RSVP week (the week of firm price posting), VIP Club members may commit any desired number VIP monthly TL shipments by issuing one single P.O. number for the lot. The *first* order *must* be given specifications *at that time.*

b) Specifications for the remainder need not be submitted until one week prior to the desired production week.

c) Extra VIP TL shipments, for delivery within the same monthly time frame, may subsequently be obtained at the same firm monthly price, subject to production and material availability. In the event of a price change (up or down) extras may be added at the new price and and [sic] with the VIP Purchase Discount and "CC" Payment Award still applicable.

d) Surplus commitments may be cancelled without recourse in the event of good faith "over-estimate" of monthly needs.

ASSURED MONTHLY PRODUCTION PRICE/SERVICE

Favored customer status—preferential production choice —VIP treatment.

Lifetime's VIP concept assures each participant of *continuous production availability* at competitive and predetermined firm pricing. Lifetime's VIP treatment diffuses the practice of "stacking" order files and/or PTS (Price Time of Shipment) selling. Each month is treated as an individual "Time Frame" and each RSVP week opens VIP access to the immediately following production month—in full proportion to monthly needs. No production time is elsewhere allocated until all VIP's have comfortably utilized *their* options first! VIP treatment assures each active VIP a standing "Box Seat" reservation for each "Time Frame" production cycle. No more 5 to 6 weeks or 5 to 6 month order files to "wait out".

APPENDIX E
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NATIONWIDE DELIVERY INTERCHANGE SERVICE

VIP Club members may purchase in any U.S. geographical sector and take delivery in any other geographical sector. For example, a California distributor can effect delivery to a New York customer without additional freight premium by using Lifetime's nationwide Central Control.

PRICE assured — SERVICE assured — QUALITY assured

7. *SALES SUPPORT*

(a) *Sales Tools—Permanent Samples* *SERVICE*

Free samples are available to VIP Club members upon request. Every model carried in the Lifetime master sample case is available to VIP Club personnel for permanent use. Includes mini door sections of Firelife, louver, Prefinish, bifold, the Lifetime exclusively patented Coreliner and others.

(b) *Sales Seminars*

Special sales/product seminars, for educational/training programs are available for VIP Club management/sales personnel, customer groups, architectural specifiers. Lead time required.

(c) *Sales Literature*

Lifetime has its own full time modern printing facility. Copies for redistribution of standard printed literature with VIP Club member name imprinted are available. Special material may also be possible. Direct mailings to member's customers may also be made by Lifetime if postage and sticker address labels are supplied.

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8. *COMMUNICATIONS SUPPORT*

(a) *Sales Manager Personal Visits* *SERVICE*

Each VIP Club member will be visited personally between three and six times annually. This service will facilitate a thorough eyeball exchange of information, encompassing current needs, trends, problems, developments, etc.

(b) *Telephone Hot Line*

VIP Club members will receive VIP membership numbers and cards and special unlisted direct-line telephone numbers (to the Sales dept., in any Divisional production plant). Call backs, where needed, will be *WITHIN THE HOUR.* No long wait for call backs—no unanswered calls—answers from *Sales at Production centers.*

(c) *VIP Club Monthly News Letter*

The monthly OPEN & SHUT TRENDS & FACTS issue, authored for intra-company management perusal by Purchasing, Marketing, Production, Administrative, Finance, and Executive Officers (Lifetime's governing Executive Board) will additionally be distributed to VIP Club members. Pertinent industry information of all phases (as seen through the eyes of the world's largest door manufacturer) will be presented to the reader.

9. *VIP QUALITY ASSURANCE*

(a) *Quality Warranty* *QUALITY*

Each door is produced under Lifetime's QMW WARRANTY attesting to overall inspection for quality of material and workmanship by QMW certified inspectors.

APPENDIX E
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(b) *Life Guarantee*

Every door is fully subject to the Lifetime Limited Guarantee.

(c) *Industry Standard*

Lifetime Industry Standard (LT I.S. 1-81) integrally accompanies and governs each door, (unless otherwise ordered).

• • • •

Membership by Invitation Only

The Lifetime VIP Club is not for everyone—not for just anyone. Lifetime extends membership only to those it deems compatible thru recognition of corresponding business standards plus accomplishments.

Eligibility excludes those whose prime philosophy is to purchase at the lowest possible "auction" price and extends to those who will select and *SUPPORT THEIR SUPPLIER* on an *OVERALL RECOGNITION* of Quality and Service—as well as Price.

Eligibility is also contingent upon a company's reputation for honoring commitments, discounting payments (without unauthorized deductions), absence of spurious claims and, in general, business consideration of others.

• • • •

LIFETIME CREED
(1) TO PERFORM WITH INTEGRITY
(2) TO MAKE A LEGITIMATE PROFIT

We will not sacrifice one in favor of the other; if unable to do both, we will do neither.

EXECUTIVE BOARD of Lifetime Doors, Inc.

"a *good* supplier is essential to the welfare of a buyer. Should such supplier be unable to warrant legitimate and reasonable compensation for investment and effort, he will cease his effectiveness as a *good* supplier" ANON

APPENDIX E
Relevant Provisions of Lifetime Doors' Sales Materials

"it's preferable to have no relationship rather than one lacking mutual respect" ANON

* * * *

Lifetime Doors, Inc. is a nation-wide multi-plant organization of proven special achievers, blended together to comprise the nations [sic] foremost door manufacturing facilities and reliable supply sources.

No. 1

LIFETIME DOORS IS THE WORLD'S LARGEST DOOR MANUFACTURER THERE IS A *GOOD* REASON

APPENDIX E
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Lifetime
VIP CARD

VIP
05D-024
Barber & Ross
Leesburg VA 22075

APPENDIX E
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PLAINTIFF'S EXHIBIT 5

LIFETIME DOORS "last a lifetime"

NATIONAL DIVISION
(National Administrative Offices)
30700 Northwestern Highway
Farmington Hills, Michigan 48018
313-851-7700

OPEN & SHUT—FACTS & TRENDS

Comments by Lifetime's Executive Board to Lifetime Divisional Management, copies to Lifetime VIPs

Edition #1663

Purchasing

Fir lumber has continued to edge downward with a total drop of $25.00 in the last six weeks to $440.00 for #2 Shop Fir as of 6/6/83. While the decreasing rate is not quite as rapid as the increase was, it is encouraging that there is a clear reversal of the trend. It is also an obvious signal of more availability, thus giving some relief to shortage pressures, but unfortunately, only to lumber.

As anticipated in last month's letter, Masonite's Colonist price has been increased to follow Weyerhaeuser's lead. However, the Masonite total increase and the total end cost now exceeds Weyerhaeuser by over 25¢ average per door. Masonite made equipment modifications to their Colonist facility in Towanda, Pennsylvania last month and had to shut down their line for a week. Although these changes are expected to increase production eventually, they have not yet made up for the lost time and as a result, have been forced to allocate production and have experienced delays in shipment and increased lead time.

Most foreign hardboard manufacturers have announced 5-10% increases for third quarter shipments. As you know, there are no domestic sources of unfinished hardboard doorskins and, therefore, this action will have a direct effect on costs.

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The plywood situation remains much the same as last reported, with no improvement in sight. Heavy demand has brought about a very "bullish" attitude on the part of the Taiwanese mills as they continue to negotiate for substantial increases over last month's levels. Serious delays in shipment prevail with many orders placed for April ship still not on the water. Orders for Oak, Ash, and now Birch are becoming even more of a problem than Lauan.

Despite the somewhat gloomy outlook above, please believe that the problems associated with purchasing increasing amounts of material are preferable to the low levels of activity experienced for the past several years.

Robert Friesner
Vice President—Purchasing

Sales/Marketing

In spite of a general feeling in some quarters that doors are currently high priced, actual averaged selling price records disclose that the two "bench-mark" products, Lauan and Birch, are virtually unchanged over the past thirty-six months.

	Average Cost Per Door Change May 1983 vs May 1980	3 Year Percent Change
2/6 Hollow Core Lauan	+03¢	+0.28%
2/6 Hollow Core Birch	+26¢	+1.90%
3/0 Solid Core Lauan	+08¢	+0.36%
3/0 Solid Core Birch	+42¢	+1.68%
4/0 Lauan Bifold	+19¢	+0.73%
4/0 Birch Bifold	+20¢	+0.69%
Average:	+20¢	+0.95%

Nonetheless prices are increasing—a factor not controllable by the door manufacturer, who is fully subject to all escalating national and international forces. In olden days, upon receipt of bad tidings, they promptly killed the messenger. If you have strong objection to higher pricings, we pray you do not become distempered

APPENDIX E
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with us in the days ahead for serving in the role of the messenger.

Three new Lifetime Regional Sales Managers are now in the following offices:

Gerhard Hemmen: Denver office covering Utah to Kansas and north.

Glen Ballard: Los Banos plant office covering California, Oregon and Reno.

John McCall: Watseka plant office covering the Ohio, Michigan, Indiana area.

Our new "Hot Lines" are working well for both parties—and we're adding more telephone capacity in Hearne. Please use *your* VIP lines freely!

Dan Hizer
Vice President—Sales

Production

Now that the lumber supply has started to ease and material is slowly becoming more available, White Fir is very gradually coming back into the market. White Fir is by far the more desirable specie for the production of door parts. It affords the best yield and our Sacramento lumber mill finds it superior for milling. However, since quantities of Douglas Fir are the primary offerings, the larger percentage of frame parts will continue to be Douglas Fir. 4/4 material continues *very* much in short supply—no relief at all—yet.

The increased lumber availability has now allowed our Sacramento lumber mill to increase production to full one-shift capacity with all cutting saws in full operation.

Our first order of new tractors in more than three years is scheduled for production the week of June 27th. We've waited a long time before daring to buy new replacement equipment. We've been making the old "do".

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These new tractors will be fitted for Jifflox (a removable tag axle) for versatility when scheduling tandem deliveries. We are able to deliver most straight hollow core orders on single axle trucks without exceeding weight limits. But orders containing large percentages of hardboard hollows or any solids require the tandem double axle.

Our new 48′ trailers for Hearne are also in production now. All plants should have additional equipment available by August 1st, which should finally ease our delivery congestion.

On the labor front our five week Watseka strike is over, the pickets have been removed, and there are no consequential production cost changes. With the aid of cross shipments from other plants, we were able to fulfill all commitments and Watseka is now back on full schedule and we did hold the line on labor costs.

Byron J. Main
Vice President—Production

Administration

Health and medical costs continue to escalate nationally at rates of 15-19% thus resulting in ever increasing cost of medical insurance of 20%-30% per year. Today health care represents about 10% of the gross national product.

Like many others, we have researched methods to level the costs incurred in continuing to supply a comprehensive medical plan to our employees. We have been reviewing several alternatives such as higher deductibles, employee participation towards premium, etc. Among these, Lifetime carefully evaluated a series of self-insurance programs and finally implemented such a plan April 1, 1983. So far, it has been extremely promising. We project this will actually reduce our last year costs, let alone eliminate the increase we were faced with.

Based on similar cash claims levels as adjusted for inflation, Lifetime now can anticipate at least two years

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of relatively stable health care costs. However, each year we will have to continue to carefully review for cash claims levels, claim frequency and duration, health and medical care inflation rates and administrative costs. Then, if necessary, other cost containment programs may be implemented.

We have found that our own constant especial vigilance over employee claims plus thorough review of medical charges to be the best way to contain our own overhead in the face of rising costs. But nonetheless we still fell prey to escalating national rates and therefore had need to research for alternatives.

For any detail information re our experience in developing our own self-insurance, please feel free to contact me.

Thomas E. Cunningham
Vice President—Administration

Finance

Results of five months operation year-to-date door shipments continue to exceed prior year by over 90%. The four week period ending May 28th is up 104% over the same period last year.

With sales volume increasing, it continues to be most important to exercise constant management control of labor and overhead costs; especially in an industry such as ours with material costs being as volatile as they are and exceeding 72¢ of every sales dollar. Imagine—less than 28¢ of each dollar is allowable to labor, freight, sales costs, management costs, etc.

Investment rates for short term funds available in early June do not vary much from the previous month, although up to 10.6% interest is currently being paid by some S & L West Coast institutions for 60 to 90-day periods.

Our five months year-to-date figures interestingly revealed that our national solid core door usage (particle

board, wood core-lined and wood only) presently represents 10.8% of our total doors produced in 1983 in relation to 13.5% for the full preceding year 1982. Regional distribution is reflected below:

	May 1983	YTD 1983	1982
Denmark SC (Atlantic South)	11.1%	10.5%	17.3%
Easton PA (Atlantic North)	11.3%	11.3%	14.7%
Hearne TX (Gulf Coast)	8.7%	9.1%	10.7%
Watseka IL (Great Lakes)	11.2%	9.1%	10.3%
Los Banos CA (Pacific Coast)	14.6%	16.5%	18.2%
Nation Wide Averages	11.0%	10.8%	13.5%

We take note of the reduction of year-to-date figures vs the full year 1982, but must remember that the usage of solid cores increases dramatically around October when major "house closing" occurs.

Len Tierman
Treasurer—Comptroller

Executive

Door demand continues undiminished, excluding the Great Lakes Division, where we have encountered a partial drop off for June production. We foresee it as a regional temporary lull—and expect a bounce back *before* July. Overall our pre-month VIP sales reservations increased about 5% over May (in spite of the Midwest fall-off of about 20%).

In view of our continually increasing VIP requirements, we are contemplating closing membership at our Denmark, Easton and Hearne production centers. If we do, new membership will be available only subject to old membership drop-out. We desire to limit our early monthly VIP pre-sales commitments to about 75% of our overall production capacity and save the balance for VIP "adders" and some of our non-VIP accounts who depend upon us regularly. But we will have to first stabilize our supply lines before making any such determinations.

We will reflect 6-panel increase in our next price list, due out this week. Your VIP orders, of course, will remain protected through the June cycle. We also have to

APPENDIX E
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face a sharp B & C Label Fire Core increase from GP, effective to us in June. July VIP prices will be increased $1.75 per Firelife door.

Our next price format for July must now consider our March purchases (June arrival and July production). May purchases (variance over April—per pair of 2/6 door skins) have finalized at: Lauan +19¢, Birch +36¢, Ash +29¢, Oak +17¢ (see #1333). June FUTURES (which we have heavily purchased already) are increased over May by: Lauan 21¢, Birch +19¢, Ash +34¢, Oak +57¢. The combination totals are staggering! As you can see, Lauan is leveling off, but Birch, Ash and Oak are going out of sight. Perhaps it's time to consider switching accounts to Hardboard Prefinished, like Texturelife, Grainlife, etc.?

We're sorry when Facts & Trends *must* make reference to such price advances—but if prices must move, it certainly is best for our industry when they go up rather than down.

The currently declining lumber prices will allow us to reduce wood stiles about 10¢ per pair and rails about 05¢ per pair. However, this will be fragmentary against current skin increases.

William B. Gilbert
President—Board Chairman

Please forward or redistribute as appropriate to others within your organization.

Route to: ____ ____ ____ ____ ____ ____
Initial: ____ ____ ____ ____ ____ ____
Date: / / / / / /
Return to: _____ file

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PLAINTIFF'S EXHIBIT 7

LIFETIME DOORS "last a lifetime"

NATIONAL DIVISION
(National Administrative Offices)
30700 Northwestern Highway
Farmington Hills, Michigan 48018
313-851-7700

OPEN & SHUT—FACTS & TRENDS

Comments by Lifetime's Executive Board to
Lifetime Divisional Management,
copies to Lifetime VIPs

Edition #2253

Purchasing

The lauan plywood situation in the Far East continues to improve and pricing holds relatively steady. The opposite applies in the case of birch, ash, and oak where deliveries are very late and pricing continues its upward trend. In these species, the cost of doorskins has increased the equivalent of $1.25 to $1.50 per door since the first of the year. There are more late shipments now than there were at the time of the last report, and stock outs are very probable. U.S. and Canadian birch and oak mills are overloaded and are unable to get sufficient raw material to take up the slack and absorb some of the additional demand, and they, too, have increased pricing and have extended lead times.

The phenominal increase in demand for the 6 panel door, both in terms of total quantity and percentage of our overall specie mix, has played havoc with supply lines. In the past six weeks, Masonite has run out of 2/0, 2/8, and 3/0 Colonist at various times. Although they are taking measures to correct this situation, they have not shipped 3/0 for the past four weeks! Masonite

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also announced a substantial price increase for orders shipped after September 1st, only three months after the last increase.

It is expected that Weyerhaeuser will shortly announce a matching increase. They had been better able to stick to their eight week lead time schedules, but now advise they are having problems obtaining fiber mats in the proper qualtity and size mix (from their West Coast operation) and that doorskin shipments will now be delayed.

Western Softwoods shop lumber has now held firm at the same level for the past three weeks, irregardless of the sharp price drop prevalent on housing construction lumber. In fact, shop pine has actually increased $5.00 this week.

Robert Friesner
Vice President—Purchasing

Sales

The demand for 6 panel (Colonist and Windsor) continues to exceed the supply ability. Lifetime's sales of 6 panel during the first six months of 1983 were 37% greater than all of 1982. The extreme demand situation has made it mandatory that we limit the quantity of 6 panel on *all* orders, as well as establish a weekly allocation or allowance for each plant. Regretfully there seems to be no foreseeable relief in sight. We will continue to monitor orders and allocate both Colonist and Windsor on a program based on individual usage during the past 7 months of 1982.

Lifetime's new price catalog was issued as of 8/1/83. All prices have been combined into Section I, all extras into Section II, and all availability, framing standards, terms, guaranties, etc. into Section III. This is a simpler and more composite presentation than heretofore, which hopefully will make it easier to understand and utilize.

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Included in the "extras" is a simplified but comprehensive outline of the new "*full visible capacity*" and "*full sections*" minimums. Such efficient loading procedures reduce cost loss, which savings is reflected to the utilizer of these efficiencies.

In Phoenix, Huck Jonas has taken retirement from Lifetime due to his wife's health which no longer permitted his necessary out-of-town travel. Lee Manges will now service customers in Arizona, New Mexico, Las Vegas and El Paso. Jim Kratz has joined our Easton Pennsylvania sales staff as Regional Sales Manager covering New York State and all of New England.

Dan Hizer
Vice President—Sales

Production

West Coast Western Softwood 5/4 shop lumber for 1-3/8 doors presently poses no supply problems. However, there is a continuing shortage of both 6/4 shop (for 1-3/4 doors) and 4/4 shop (for 1-1/8 doors—mostly bifolds).

We hope to make news on one new front this month. Our Watseka, Illinois plant is scheduled to install the nation's first computer operated "*door stamper*" (printer) starting August 15th. This will eliminate sloppy illegible hand stamping and provide computerized recordings and uniform physical markings of size, specie, etc., per each individual door and add yet another notch to our "leadership gun" in product manufacturing. This active Lifetime "project" of over eight years effort is finally culminating into a reality. Much dreaming, planning, trial and error, headache and heartbreak are already into it, but we think we've got it all together. If it's "go", we will follow suit in our Denmark, Easton, Hearne and Los Banos plants respectively and immediately.

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Our Los Banos California strike is settled and our new contract has been signed. We're pleased to report that we were able to hold our labor costs in line, and production is now back on full production schedule. We should be caught up on all delinquent commitments by the end of the second week in August.

Elsewhere, in Los Banos, in order to allow needed additional production versatility, we are installing equipment that will also add to our "press" and "special sizes" capacity. This project is slated for completion in late September or early October. This will give us, both, greater variety and greater production.

We're seriously reviewing an extensive program to add substantial storage space for raw material to each of our door plants. We are seeking a way to storage more protectively against the shipping abortments that our industry is frequently faced with, especially at present. We would like to eliminate or reduce future repetition.

Byron J. Main
Vice President—Production

Administration

Rolling Stock:

Fourteen new 48′ trailers so far have now been received at Hearne and Lifetime's own unique "damage free" locking systems and padded runners are being installed—ready to start service by September 1, 1983.

[Picture Omitted in Printing]

A second batch of ten new 48′ trailers will be starting down the assembly line by mid August—these destined for Los Banos, California, to be serviceable by October 1, 1983.

Nine new GMC tractors, so far, have been released by GMC—Pontiac, MI and are heading for destination lo-

cations with expected arrival and into service by September 1, 1983.

Firelife Door—Labeling

Reports from the field confirm U/L's ultra-rigid enforcement policy (effective 7/1/83) requiring that jobsite "machining" of fire doors be done *ONLY* under *THEIR* inspection agreement in order to affix their U/L fire door label. Warnock Hersey continues to offer a more flexible distributor plan—providing a post jobsite machining inspection service where required by local building code, but none where no local requirement exists.

The number of separate code jurisdictions requiring compliance with NFPA-80 fire door machining under certified inspection service, continues to increase, slowly but steadily. It apparently is merely a matter of time until this trend becomes a national application.

Self Insurance—Health Benefits

Paid claims for the first three months of our self insured health care plan are running about 20% less cost than our previous plan. Early results are currently exceeding expectations. Current reductions, plus increased premiums we would have been paying, result in a savings swing of about 35%. Evaluations are in progress to determine feasibility of extending self insurance to other lines of coverage, especially Workmens Compensation.

Computer Update

Progress towards installation of our new IBM System 38 computer hardware and multi-terminals, along with corresponding appropriate software for purchasing, manufacturing, inventory control, costing, sales, receivables, payables and other financial, remains satisfactory and on target. We find individual department personnel involvement necessarily sharply increased as specific needs

become identified. We anticipated this, but not the extent!

Thomas E. Cunningham
Vice President—Administration

Finance

Average weekly production and shipments continued strong in July with dollar volume up 3% over previous month. Unit deliveries rose slightly less, indicating a higher percentage of more costly doors being shipped, or possibly a reflection of currently higher door pricings.

Continued follow up of sales of bifolds during July confirms the June six month trend based on YTD figures with bifolds currently representing 7.55% of total unit shipments. The chief bifold "nest area" appears to be the Great Lakes region.

	July 1983	Seven Months 1983	Year 1978
Atlantic South	5.95%	4.93%	2.6%
Atlantic North	8.00%	6.90%	4.0%
Gulf Coast	6.99%	7.52%	4.7%
Great Lakes	11.83%	13.26%	16.8%
Pacific Coast	6.20%	5.18%	7.3%
Nationwide Average	7.55%	7.33%	6.0%

Solid core doors shipments during July with YTD and 1982 comparison follows:

	July 1983	Seven Months 1983	Year 1982
Atlantic South	9.48%	10.29%	17.3%
Atlantic North	9.98%	10.56%	14.7%
Gulf Coast	8.50%	9.10%	10.7%
Great Lakes	11.74%	9.49%	10.3%
Pacific Coast	16.11%	17.53%	18.2%
Nationwide Average	10.25%	10.75%	13.5%

The chief user of solids is the West Coast, possibly a reflection of condominium and apartment activity. As reported previously, solid core door shipment percentages generally increase during the Fall.

A six month review of customer payment methods shows an increase of use of discounts, with less than

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Doors' Sales Materials

14% non-discounting. A comparative analysis of discounts by geographical division is as follows:

	Six Months 1983	Year 1982	Year 1981
Atlantic South	87.80%	86.89%	85.55%
Atlantic North	90.71%	85.25%	88.53%
Gulf Coast	85.90%	87.53%	89.49%
Great Lakes	87.46%	79.79%	80.14%
Pacific Coast	73.87%	57.34%	46.31%
Nationwide Average	86.02%	84.05%	84.49%

Daily roll-over funds paid us 9.25% at the end of July; up ¼ of 1% from June with 11% still available for 30-day periods in selected areas.

Len Tierman
Treasurer—Comptroller

Executive

Our "skins" supply lines are indicative of the confusion within the industry. Presently Lauan shipments are timely and supplies are adequate. South American hardboard supply looks staple in spite of some mumbling about imposing quotas. Birch shipments are now running three months late, minimum, and getting worse. Ash and plain slice Oak are improving slowly and we anticipate we will once again have inventories rotating by Labor Day. 6 pnl appears to be severely inadequate for August and September at best.

On the pricing front, Masonite has boosted pricing on *prior accepted* orders about .75¢ per door. Birch is going straight up! Ash and Oak are also still advancing, more moderately. Hardboard is steady. Lauan is hanging on. * Birch appears to be developing into the next serious supply problem, probably before August ends.* Due to heavy pre-planning, Lifetime may be alright during the pending Birch shortage.

On the business front, we detect a *weakening.* Our July production and shipments continued strong but our future sales activity *lessened* for the first time in the

APPENDIX E
Relevant Provisions of Lifetime Doors' Sales Materials

last 7 months, and August is showing a continuance. Excluding the "later started" West Coast, all other markets seem to be slowing in momentum, particularly in the Midwest Great Lakes areas and, to a lesser degree, the Northeast Atlantic areas. This is a very early reading which may prove wrong, but at this point, even the Atlantic South and Gulf Coast are showing slow-up signs. The current ½% prime rate increase and the 2% mortgage rate increase over the last two months will likely soon become a recognizable negative factor in our industry.

Regardless of any regional slow-ups, we have closed VIP membership in Denmark, Easton, and Hearne where we are too close to production saturation. New memberships will be available only via attrition. Our other production centers remain open to new memberships.

We've successfully concluded (but also paid for) two strikes, both now well behind us, *without yielding* to demands. We hope we will be but one of a great majority holding the line this time around and helping to set a positive pattern, particularly in our industry.

William B. Gilbert
President—Board Chairman

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No. 86-1921

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LIFETIME DOORS, INC.,
Petitioner,

v.

BARBER & ROSS CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

DAVID POVICH
RICHARD M. COOPER
(Counsel of Record)
STEVEN R. KUNEY
MARK S. LEVINSTEIN
WILLIAMS & CONNOLLY
839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Respondent Barber & Ross Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

STATEMENT WITH RESPECT TO CORPORATE SUBSIDIARIES AND AFFILIATES

Undersigned counsel certifies that respondent, Barber & Ross Co., has no corporate parents, subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On the evidence presented, the jury was entitled to find, and presumably did find, the following facts. Barber & Ross Co., plaintiff below, was in the millwork supply business—it purchased from various manufacturers interior and exterior wood trim products, such as doors, moldings, and bannisters, for eventual use in new home construction; it prepared and packaged those products for easy installation by builders, and delivered them to construction sites. A key part of the service Barber & Ross provided was delivering to each house at the right

time in the construction process the precise collection of millwork products needed by a builder.

Lifetime Doors, Inc., defendant below, was the nation's largest manufacturer of doors. Lifetime was, by its own estimate, at least two and a half times the size of its next largest competitor. The bulk of Lifetime's output consisted of "flush" doors, which are plain rectangular doors typically made with a hardboard outer layer, known as a "skin." Lifetime also manufactured doors with a molded or sculpted "skin" designed to imitate traditional, wood panelled doors ("six panel" doors). These six panel doors, which were more expensive than flush doors, were the mainstay of Barber & Ross' business because they were popular in the colonial style housing that predominated in the area where Barber & Ross did business.

In early 1983, Lifetime's regional sales manager solicited Barber & Ross' six panel business—an account sufficiently large that Barber & Ross would be one of Lifetime's top six panel customers in the southeastern United States, generating almost a million dollars in sales annually. After Lifetime agreed to supply Barber & Ross' requirements of approximately four truckloads of six panel doors per month, as well as the flush doors it was already providing, Barber & Ross agreed to shift all of its six panel purchases to Lifetime.

Within a few months, however, in July of 1983, Lifetime drastically altered the terms on which it was willing to honor that commitment. Lifetime instituted what it called an "allocation system" for the sale of six panel doors: from then on, the number of six panel doors any customer could buy was to be limited according to the number of flush doors that customer bought. Lifetime's president told his sales force that Lifetime was imposing this system because it was no longer willing to sell six panel doors to customers that bought their flush doors from Lifetime's competitors. In implementing this sys-

tem, Lifetime reviewed its customers' past purchases of six panel and flush doors, and then mandated various ratios of flush to six panel purchases, depending upon the customers' past purchases, which ratios required that they buy a far greater percentage of flush doors than many of its largest six panel door customers, including Barber & Ross, had previously demanded.

Lifetime's salesmen told customers that six panel doors were not available, and they refused to fill orders unless the customers also bought the prescribed number of flush doors. At the same time, however, Lifetime was accumulating a substantial inventory of unsold six panel doors. The only two domestic sellers of six panel door skins, an essential component in the manufacture of six panel doors, announced that they were going to limit the door manufacturers' skin purchases; but Lifetime, as their largest customer, actually received an allotment of six panel skins for the remainder of 1983 that exceeded its previous share. Thus, while word spread in the summer of 1983 that there might be a "shortage" of six panel doors, Lifetime had the ability to make and sell more six panel doors than ever before, and would have done so but for its decision to impose its so-called "allocation system."

Lifetime's strategy of stockpiling six panel doors and tying the sale of six panel doors to the sale of flush doors tremendously disrupted the business of many of its customers, including Barber & Ross. During the summer of 1983, Barber & Ross received only half as many six panel doors as it needed, along with thousands more flush doors than it wanted or could readily use. Barber & Ross was forced to bear the expense of warehousing the flush doors it did not yet need, while at the same time it had to deliver to customers millwork packages that lacked the six panel doors they wanted. A number of Barber & Ross' previously loyal, long-time customers cancelled orders and took their business elsewhere.

When Barber & Ross pressed Lifetime in August for assistance in meeting its customers' demands, particularly in light of Lifetime's agreement just a few months earlier to supply Barber & Ross' requirements of six panel doors, Lifetime insisted that any shipments to Barber & Ross would have to be within the "allocation" guidelines Lifetime had established. Those guidelines mandated that Barber & Ross buy three flush doors for each six panel door it wanted, even though Lifetime knew that meant that Barber & Ross would have to purchase what amounted to more than a five month stock of flush doors in order to obtain just a one month supply of six panel doors. When Barber & Ross told Lifetime that it doubted the legality of this system, Lifetime terminated all shipments to Barber & Ross.

This abrupt termination left Barber & Ross with no supply of six panel doors at a time when other manufacturers were unwilling to take on major new customers of Barber & Ross' size. Despite its efforts to find alternative sources of supply and even to develop a substitute, imitation six panel door of its own, Barber & Ross lost a significant amount of business because it could not supply the mix of doors its customers wanted.

Lifetime's tying of flush door sales to six panel door sales succeeded in forcing many of its customers to purchase a mix of doors quite different from what they wanted. Lifetime's goal of not selling six panel doors to customers that purchased flush doors from its competitors was essentially achieved. In addition, with the six panel doors it withheld from Barber & Ross and others, Lifetime solicited and gained a substantial number of new six panel customers on the condition that these new customers agree to buy approximately eight flush doors for every six panel door they received. By forcing this change in its existing customers' buying patterns, and by gaining these new customers who were made to buy a tremendous number of flush doors to obtain just a few

six panel doors, Lifetime significantly increased its flush door sales even though demand in the market generally was declining.

Competing flush door manufacturers were adversely affected by Lifetime's effective use of six panel doors to expand its share of the flush door market. New entrants were virtually shut out of the market because they found that many potential customers were being forced to buy all their flush doors where they bought their six panel doors. Flush door sales were increasingly determined by control of the six panel door market, rather than by competition on the merits for flush doors.

Barber & Ross brought the instant action in the United States District Court for the Eastern District of Virginia, claiming, among other things, (1) that Lifetime had restrained trade in violation of the federal antitrust laws by tying the sale of flush doors to the sale of six panel doors, and (2) that Lifetime had breached the agreement the parties had reached early in 1983 when Lifetime solicited Barber & Ross' six panel business. The jury found for Barber & Ross on both these antitrust and contract claims, and specifically found that Lifetime's practice of tying the sale of flush doors to the sale of six panel doors was both a *per se* violation of the antitrust laws and an unreasonable restraint of trade under the rule of reason.

On appeal, Lifetime's primary challenge to the antitrust verdict was that Barber & Ross lacked standing because it had suffered no cognizable antitrust injury. Lifetime attacked the conclusion that it had committed a *per se* violation of the antitrust laws on the ground that its market share was inadequate as a matter of law for it to possess the market power necessary for a *per se* violation. As to the rule of reason verdict, Lifetime argued that there was insufficient evidence to establish a geographic boundary for the tied product market. Lifetime also challenged the determinations that an en-

forceable contract existed between the parties and that it had breached that contract, as well as the proof of Barber & Ross' damages.

The court of appeals found no serious question about Barber & Ross having suffered antitrust injury; and, in a narrow opinion, it affirmed the antitrust verdict on the basis of the rule of reason violation found by the jury, without reaching the *per se* issue. It also rejected Lifetime's arguments with respect to the contract verdict and damages.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Correctly Analyzed the Issues Presented for Appellate Review and Established No New Precedent In So Doing.

In arguing that this Court should review the court of appeals' decision in this case, Lifetime repeatedly refers to "the Fourth Circuit Rule." Petition ("Pet.") at 5-7, 10-12. The court below, however, established no new rule of law in deciding this case. It analyzed correctly those specific questions presented by Lifetime for its review. It discussed at some length Lifetime's threshold argument that Barber & Ross had suffered no antitrust injury. Appendix to Petition ("App.") at 7a-9a. And it disposed of Lifetime's only other basis for seeking reversal of the rule of reason verdict—the alleged insufficiency of the evidence of the geographic boundary of the tied product market. App. at 10a.

Lifetime now abandons its earlier arguments and tries instead to create a defective "rule of law" from the Fourth Circuit's responses to the precise issues Lifetime raised on appeal. As will be demonstrated below, however, the court of appeals correctly decided this case on the basis of the particular factual record before it, and its opinion stands for none of the far-reaching propositions Lifetime suggests.

Moreover, Lifetime identifies no conflict among the circuits or likely confusion among the lower courts as to the applicable legal principles. This Court addressed this area of antitrust law at length just three years ago in *Jefferson Parish Hosp. District No. 2* v. *Hyde* ("*Jefferson Parish* v. *Hyde*"), 466 U.S. 2 (1984), and there is no need for further review by the Court at this time.

A. The Fourth Circuit Opinion Does Not Improperly Eliminate Market Power as a Consideration in Rule of Reason Analysis.

Lifetime's primary argument is that the court of appeals ignored the question of Lifetime's market power over the tying product. Pet. at 5-10. But the reason the Fourth Circuit did not discuss market power in responding to Lifetime's attack on the rule of reason verdict is that Lifetime never raised this issue on appeal. Indeed, at no time during this litigation, until now, did Lifetime advance this argument. In its post-trial motion for judgment notwithstanding the verdict, Lifetime raised no issue about market share or market power in challenging the rule of reason verdict.[1] And it did not brief or argue this point in its appeal. Because Lifetime failed to preserve this issue on appeal, this Court should not consider it. *See, e.g., City of Springfield* v. *Kibbe*, —— U.S. ——, 107 S.Ct. 1114, 1115-16 (1987) (no review of issues not pursued below absent exceptional circumstances).

During every stage of this litigation, moreover, the issue of market power was litigated. Lifetime based its

[1] In its motion for a directed verdict on all of Barber & Ross' antitrust claims, Lifetime attacked Barber & Ross' evidence of market power as too speculative, arguing that the data Barber & Ross presented as to various door manufacturers' six panel "skin" purchases (an essential input in making these doors) could not support any inference about those manufacturers' share of the six panel door market. In these circumstances, it appears that Lifetime failed to preserve the issue it now seeks to raise in the district court, quite apart from its subsequent failure to preserve it in the court of appeals.

defense to Barber & Ross' claim of a *per se* violation on the proposition that, given its market share, Lifetime did not have the market power necessary for a *per se* violation. The trial court rejected Lifetime's argument that it should give no instruction on the alleged *per se* violation because Lifetime lacked market power as a matter of law, and instructed the jury that it must decide whether Lifetime had market power in reaching its verdict on Barber & Ross' *per se* claim. The jury found market power here, as indicated by its affirmative response to the special interrogatory about whether Lifetime's conduct was a *per se* violation of the antitrust laws.

Because Lifetime pursued this defense to the *per se* violation on appeal, the parties briefed and argued the sufficiency of the evidence of Lifetime's market power in the tying product market. That evidence showed that Lifetime did have market power, as the jury found. Lifetime was by far the dominant six panel door manufacturer, with a market share of over thirty percent in a market where its next largest competitor had a share of only about ten percent.[2] Barber & Ross' expert testified that this relative size advantage was a significant factor in his concluding that Lifetime possessed market power. J.A. 1154.[3] Moreover, the record contained evidence that Lifetime behaved like a firm with market power: (1) it was able to restrict output by accumulating six panel inventory at a time of increasing demand, (2)

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[2] For these purposes, of course, conflicts in the evidence must be resolved in favor of the party for whom the jury found. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). Much of Lifetime's statement of facts and argument ignores this fundamental precept of appellate practice and asks this Court to accept its view of conflicts in the evidence that the jury obviously resolved against it.

[3] For purposes of this Brief in Opposition, the record below is the Joint Appendix prepared in connection with the appeal of this matter, cited herein as "J.A."

it effectively raised six panel door prices by requiring more flush door purchases for each six panel door its customers purchased, and (3) it was able to impede new entry by would-be competitors. J.A. 1105-06, 1160-65, 1324-25, 1950-61, 2316-23.

As this Court has made clear, moreover, the reason to consider market power in a tying case is to assess the likelihood of anticompetitive forcing. *See Jefferson Parish* v. *Hyde*, 466 U.S. at 12-14. Here, the record contained direct evidence of such anticompetitive forcing—that is, substantial, unwanted purchases of the tied product by Lifetime's customers as a result of the coercive effect of Lifetime's tie. A number of Lifetime's customers testified that, due to Lifetime's position in the six panel door market and the lack of viable alternative sources of those doors, they unwillingly increased their flush door purchases from Lifetime, as required by Lifetime's so-called "allocation system," in order to assure continued shipments of six panel doors. J.A. 1022-23, 1068-69, 1374-75. A detailed statistical examination of Lifetime's six panel customers in the southeastern United States revealed a widespread pattern of dramatic increases in flush door purchases after Lifetime imposed its tie, entirely out of proportion to those customers' previous purchasing patterns, and in obvious response to the high ratios of flush to six panel purchases mandated by the tie. J.A. 1172-75, 2016-19.

To the extent Lifetime argues that a separate finding of market power in the tying product market is an essential element of every rule of reason tying violation, Pet. at 5-6, notwithstanding the evidence of anticompetitive forcing or foreclosure, it ignores a key portion of this Court's opinion in *Jefferson Parish* v. *Hyde*. After discussing at length the importance of market power in establishing a *per se* tying violation, the Court observed:

> When, however, the seller does not have either the degree or the kind of market power that enables

> him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

466 U.S. at 17-18. In other words, a tie-in may run afoul of the rule of reason even without a specific finding of market power in the tying product market, if the plaintiff can meet the typically much more difficult burden of proving an unreasonable restraint on competition in the tied product market. This Court has made that same point in discussing the significance of showing market power in the context of other rule of reason violations:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Federal Trade Commission v. *Indiana Federation of Dentists*, —— U.S. ——, 106 S.Ct. 2009, 2019 (1986) (citation omitted).

In sum, there is no basis for Lifetime's claim that the opinion below somehow stands for the proposition that even the weakest competitor in a market presumptively violates the antitrust laws if it sells two products together, and its sales thereafter increase. Pet. at 5. The court of appeals' review of the facts of this case, in which it expressly referenced the record proof of Lifetime's ability to restrict output and to use its power over the tying product to force its customers to make otherwise unwanted purchases of the tied product, App. at 5a-6a, 10a, makes it perfectly obvious that the Fourth Circuit's decision refers to a firm with the power to coerce, and not to the "weakest competitor" in the market.

B. The Fourth Circuit Adequately Considered the Sufficiency of the Evidence as to the Anticompetitive Effect of Lifetime's Conduct.

Lifetime also complains about the court of appeals' terse discussion of the evidence that Lifetime's conduct had a demonstrable anticompetitive effect. Pet. at 10-12. As in the case of its market power argument, however, Lifetime is itself responsible for what it now claims is a serious omission in the Fourth Circuit's opinion. Lifetime's sole basis for seeking reversal of the rule of reason verdict was a supposed defect in the geographic definition of the tied product market.[4] In making that argument, Lifetime summarized Barber & Ross' evidence of anticompetitive effect, and then insisted that "[a]bsent a showing of the geographic scope of the market, there was no way to determine whether these facts indicated an unreasonable restraint of trade in the flush door market." Brief for Appellant at 30. Lifetime did not contend, as it does now, that even accepting Barber & Ross' geographic definition of the tied product market, the evidence of anticompetitive effect was inadequate.

The Fourth Circuit summarily rejected Lifetime's attack on the sufficiency of the evidence to define the geographic boundary of the tied product market, App. at 10a, and found ample evidence of an anticompetitive effect in the circumstances of this case. *Id.* In so doing, the court answered the question Lifetime now raises.

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[4] Barber & Ross contended that the relevant geographic market for both six panel and flush doors was the United States, east of the Mississippi River. Lifetime argued for a nationwide market. Despite evidence that most buyers purchased and most sellers sold the two types of doors together, and expert testimony outlining the other factors that suggested a geographic market for doors generally (*i.e.*, transportation costs, area within which consumers looked to purchase, etc.), and despite Lifetime's acceptance for purposes of appeal of the sufficiency of the evidence as to the geographic boundary for the six panel door market, Lifetime nonetheless claimed that this same evidence was not sufficient to establish the geographic boundary for flush doors.

The particular facts in the record before the court of appeals make it obvious that, despite Lifetime's argument to the contrary, this is not a case in which the only evidence from which to infer an anticompetitive effect is that Lifetime's sales of the tied product increased. Pet. at 10-12. Rather, the record contains evidence that those sales increased precisely because Lifetime engaged in anticompetitive forcing of its customers.[5] There was also evidence that Lifetime took market share from its competitors and deterred entry by would-be flush door competitors. J.A. 1105-06, 1182-86. Finally, Lifetime's president admitted that the foreclosure of his competitors was the very purpose of his actions—as he put it, Lifetime was no longer willing to sell six panel doors to customers that bought flush doors from its competitors. J.A. 2316.[6]

Moreover, there was no need here to conduct a lengthy inquiry into the magnitude of the restraint in the tied product market. As this Court recently emphasized, no elaborate market analysis is necessary to sustain a rule of reason verdict if there is evidence of some adverse effect on competition, and the challenged practice has no pro-competitive justification. *See Federal Trade Commission* v. *Indiana Federation of Dentists*, 106 S.Ct. at 2018-19.[7] On the particular facts in this record, this is pre-

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[5] J.A. 1022-23, 1068-69, 1374-75. That evidence alone distinguishes this case from many tying cases, including *Jefferson Parish* v. *Hyde*, in which, as the Court noted, the record did not show that the defendant had been able to "force consumers to take . . . services they would not select in the absence of a tie." 466 U.S. at 28-29.

[6] Intent, of course, may be relevant to help determine effect in cases in which the pro-competitive or anticompetitive nature of the effect is ambiguous. *See, e.g., Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The finding of anticompetitive effect, therefore, did not have to depend on an "unsupported assumption," Pet. at 11, but, rather, was based on the evidence.

[7] In so holding, of course, this Court merely reaffirmed its earlier conclusion that "where the anticompetitive effects of conduct can

cisely such a case. The evidence below demonstrated Lifetime's anticompetitive forcing of consumers and the substantial foreclosure of competitors in the tied product market, as well as its intent to produce these effects. On the other hand, Lifetime admitted that, in the circumstances of this case, it could articulate no pro-competitive benefits of or justifications for its conduct. J.A. 1428-29.[8]

In short, the facts here made it easy for the court of appeals to determine that the jury could reasonably find that the restraining effects of Lifetime's conduct outweighed its pro-competitive benefits. That determination was fully consistent with settled principles of antitrust analysis as reflected in the decisions of this Court and the other circuits.

C. The Court of Appeals' Opinion Establishes No Rule of Presumptive Illegality for Tied Sales.

As the evidence discussed above concerning market power and anticompetitive effect suggests, the court of appeals' decision creates no rule of presumptive illegality for tied sales. Lifetime's argument to the contrary, Pet.

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be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." *National Collegiate Athletic Association* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110-11 n.42 (1984).

[8] This admission on Lifetime's part of no pro-competitive justification for its actions is the second and perhaps more important respect in which this case is factually distinct from many tying cases. *See, e.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 514 n.9 (1969) (White, J., dissenting) (enumerating potentially pro-competitive effects of tying). That inability to find any pro-competitive rationale may be related in part to the fact that, as the court of appeals observed, there was evidence that Lifetime's stated justification for its allocation system was a mere "pretext" to conceal its anticompetitive intent. App. at 10a.

at 12, is simply not supported by the language of the court's opinion.

Due to the manner in which Lifetime framed the issues on appeal, the discussion of the substantive rule of reason tying violation is, in fact, the briefest section of the opinion below. To the extent the court of appeals' review of the sufficiency of the evidence here stands for any general proposition, it can only be this: in those cases, however rare, in which the facts demonstrate that the dominant firm in a market—which has shown its market power over the tying product by restricting output and effectively raising prices—intentionally uses its control of the tying product anticompetitively to force its customers to purchase the tied product, and it thereby succeeds in foreclosing significantly the opportunities for its competitors in the tied product market and even in deterring entry by would-be entrants into that market, and that dominant firm admits that such foreclosure was the purpose of its actions and that it cannot articulate any pro-competitive rationale whatsoever for its conduct, a jury may permissibly conclude that that firm has unreasonably restrained trade in violation of the antitrust laws.

II. The Court of Appeals' Determination Under the Virginia Statute of Frauds Raises No Issue of Federal Law.

Lifetime's final basis for seeking certiorari concerns the court of appeals' determination that certain documents distributed by Lifetime in soliciting business were sufficient to satisfy the Virginia Statute of Frauds. Pet. at 13-16. This is a question of state law, as to which Lifetime's position has already been considered and rejected during this litigation by three different district court judges in the United States District Court for the Eastern District of Virginia, and by a three-judge panel of the Court of Appeals for the Fourth Circuit. Morever, as the court of appeals made clear, its conclusion that

these writings satisfied the Virginia Statute of Frauds was not essential to its resolution of any of the antitrust issues in this case or to its affirmance of the damages award to Barber & Ross. App. at 10a & n.4.

There is, in short, no question of federal law implicated by the court of appeals' ruling that, under Virginia law, Lifetime's agreement with Barber & Ross was an enforceable contract.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID POVICH
RICHARD M. COOPER
(Counsel of Record)
STEVEN R. KUNEY
MARK S. LEVINSTEIN
WILLIAMS & CONNOLLY
839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Respondent
Barber & Ross Company

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Patrick A. Moran*
Mary Lou Steptoe
Fredric A. Smith
SIMPSON & MORAN, P.C.
555 South Woodward
Fifth Floor
Birmingham, Michigan 48011
Telephone: (313) 642-2000
Attorneys for Petitioner
**Counsel of Record*

Of Counsel:
Donald F. Turner
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 662-9115

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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LIFETIME DOORS, INC.,
Petitioner,

v.

Barber & Ross Co.,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Respondent Barber & Ross Co. ("B & R") does not and cannot challenge Petitioner's summary of the law on tying. B & R nowhere disputes that a proper rule of reason tying analysis requires a court to find that a defendant had market power in the tying product market and that the tied sales resulted in anticompetitive effects in the tied product market. Manifestly, the Fourth Circuit found a tying violation below without meeting these long-settled analytical requirements, and did so in an opinion so broad as to establish a new Rule on tying which is at variance with the reasoning of this Court in *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984).

Since B & R has no substantive defense, it attempts to downplay the dangerous new precedent of *Lifetime Doors, Inc. v. Barber & Ross Co.,* 810 F.2d 1276 (4th Cir. 1987) by (a) adding language to the Fourth Circuit opinion which brings it into conformity with proper tying analysis; and (b) arguing that the opinion can be dismissed as *sui generis.* Neither of the two contradictory positions is valid. The holding in *Lifetime Doors* is very broadly worded and there is nothing in the opinion to prevent the Rule it creates from being applied freely in the future. The opinion below diverges widely from established precedent and must be reviewed in order to restore harmony among the circuit courts' treatment of tying violations.

Petitioner Lifetime Doors, Inc. ("Lifetime") responds to B & R's chief arguments as follows:

I.

RESPONDENT FAILED TO LIMIT THE PRECEDENTIAL EFFECT OF THE OPINION BELOW

B & R castigates Lifetime for warning that a new Rule on tying was created by the Fourth Circuit in *Lifetime Doors*. B & R wishes this Court to believe that the precedent can be confined to the narrow facts of the case. The very nature of the Fourth Circuit's perfunctory and illogical opinion dooms such optimism. B & R produced a narrow "general proposition" from that opinion only after reading into it numerous limiting facts and legal connotations which the Fourth Circuit totally left out.

A side-by-side reading of B & R's "general proposition" derived from the opinion and the opinion itself shows how unconstrained the Fourth Circuit Rule really is:

B & R's Proposition	Fourth Circuit Opinion	The Fourth Circuit Rule
1. When two products are sold together (Tied Sale)	Tied Sale	Tied Sale
2. By the dominant firm in the market	No discussion of dominance; introductory section of opinion (p. 3) mentions that Lifetime is a "large" manufacturer of doors, but even a "large" manufacturer can be a "small" (weak) competitor.	By a "large" company
3. Intentionally	No discussion of anticompetitive intent, as opposed to robust competitive intent — a notoriously difficult distinction in situations of unilateral action. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).	———

4. Uses its control of the tying product [restatement of #2, *supra*]	*See* #2, *supra*. No discussion of why Lifetime's control over panel doors was any greater than any other manufacturer's control over its own product.	Of two of its products
5. To force	No search for objective proofs of forcing (*e.g.*, the price of the package exceeds the sum of the competitive prices for each item purchased separately).	Allegation of force
6. Its customers to purchase the tied product	Court accepts B & R's testimony that it was "forced" (pp. 5, 6, 8), references other customers (p. 5), but gives no specifics as to how many were forced, how, or when.	By one customer
7. Thereby succeeds in foreclosing significantly . . . its competitors	No discussion of foreclosure	———
8. And even succeeds in deterring entry	No such holding	———
9. And cannot articulate a pro-competitive rationale	Some general reference to anticompetitive intent, as in #3, *supra*, but no discussion of why, when, or if intent is relevant. *Cf. Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d 1366, 1373 (9th Cir. 1983) ("the fact that no competitive benefits are advanced in favor of a restraint . . . does not automatically constitute it unreasonable under the Sherman Act.")	Without procompetitive articulation

Results In
Sherman Act Violation

When B & R's restatement of the Fourth Circuit holding is pruned to an accurate level, it agrees with Lifetime's summary of the holding. There is indeed a Fourth Circuit Rule on tying, and it is: a firm which offers two products for sale together must be prepared to justify its distribution policy lest it be successfully sued for tying by a single customer which claims it was forced to buy the package — even though there has been no proof that the seller could or did disrupt competition in any relevant market. In other words, tied sales by all but the "smallest" seller are presumptively illegal.

This precedent jeopardizes virtually every tandem sale. It will chill robust and innovative competition.

B & R states that Lifetime has not shown a conflict in the circuits. It is quite clear, however, that two distinct and conflicting analytical approaches to tying have emerged among the circuits. The first, embraced by the First, Third, Seventh and Eleventh Circuits, follows the reasoning in *Jefferson Parish* requiring proof of substantial market power as a threshold element in a tying violation. 466 U.S. 2, 12-14. *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623 (1st Cir. 1984); *Ungar v. Dunkin' Donuts Of America, Inc.*, 531 F.2d 1211, 1224 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670-73 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1659 (1986); *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1414 (11th Cir. 1987); *Spartan Grain and Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985). Failure to establish market power is a "fatal weakness" which renders every other element of the antitrust case irrelevant. *Will*, 776 F.2d at 671.

In troubling contrast, the Ninth Circuit, now joined by the Fourth in this matter, obviously considers market power to be a subsidiary, if not insignificant, element of tying analysis. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) holds that a tying plaintiff may prevail without establishing defendant's power over price in the

relevant market, merely by showing that defendant's competitors cannot provide the *identical* package of goods. Circular and sterile as this reasoning may be, it at least acknowledges that market power is an issue which must be addressed, however fleetingly, while deciding a tying case. Going even further, however, the Fourth Circuit in this matter has dispensed altogether with the market power question. Together these two cases, but particularly *Lifetime Doors,* evidence a disturbing trend away from the ordered, economically sound analysis of tying practices set forth in *Jefferson Parish* and followed by most jurisdictions.

II.

THE FOURTH CIRCUIT FAILED TO CONSIDER MARKET POWER IN THE TYING PRODUCT AS AN ELEMENT IN A TYING VIOLATION

B & R barely challenges Lifetime's contention that the Fourth Circuit erred in not reviewing the record for evidence of Lifetime's market power in the tying product (panel doors). B & R attempts to sidestep the whole issue by claiming that this argument was not raised below in the context of a rule of reason discussion. However, B & R contradicts its own argument by conceding that market power was litigated "during every stage of this litigation." R. Br. at 7.

Lifetime's briefs on appeal to the Fourth Circuit contain thorough discussions of market power as a threshold element of a tying violation. B & R asks this Court to disregard those arguments because a portion were made in context of *per se* analysis. However, as this Court has noted "there is often no bright line separating *per se* from Rule of Reason analysis." *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 104, n. 26 (1984). As a comparison of the majority opinion and concurrence in *Jefferson Parish* shows, the *per se* and rule of reason analyses share the following key elements of a tying violation: existence of separate products, market power in the tying product[1] and a substantial foreclosure effect in the tied market. It is a fundamental truth of antitrust law that market power is the *sine qua non* of every rule of reason case. *See, e.g., Polk Brothers, Inc. v. Forest City Enterprises, Inc.,* 776 F.2d 185, 191 (7th Cir. 1985) (collecting cases); *Graphic Products Distributors, Inc. v. Itek Corp.,* 717 F.2d 1560, 1568-72 (11th Cir. 1983) (collecting authorities); Easterbrook, *The Limits of*

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[1] "*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have pro-competitive justifications that make it inappropriate to condemn without considerable market analysis. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. at 11-12." *National Collegiate Athletic Association,* 468 U.S. at 104, n. 26.

Antitrust, 63 Tex. L. Rev. 1, 20 (1984). Where a case was argued on alternative rule of reason and *per se* grounds, it would be a paradox indeed for a court to confine market power arguments to the *per se* context alone.[2] B & R would have near identical market power testimony and argument made twice: once for a *per se* analysis and once again under the rule of reason. Requiring such a duplicative waste of a court's time elevates semantic labels over legal and economic content.

Respondent's attempt to analogize to *Federal Trade Commission v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009 (1986) *("IFD")* is equally strained. *IFD* concerned a conspiracy among competitors to withhold services which customers demanded. Such horizontal "naked" restraints on competition are traditionally far more suspect than unilateral conduct or vertical restraints, and far more easily seen to impair market performance. 106 S.Ct. at 2018, 2019. As Judge Bork has put it, "the fact of agreement defines the market." R. Bork, *The Antitrust Paradox*, 269 (1984). Even in *IFD*, this Court confined approval of truncated market analysis to situations where "actual, sustained adverse effects on competition" are obvious. 106 S.Ct. at 2019. As discussed in our Petition for Certiorari, our case does not present an obvious picture of detrimental competitive effects. Accordingly market power analysis cannot be omitted.

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[2]The simple difference between the two approaches is that a *per se* analysis will lead to a conclusive presumption of illegality once all threshold factors are present, whereas a rule of reason analysis continues beyond the threshold factors to weigh actual benefits and costs of the challenged conduct in its proper competitive context. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-51 (1977); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Patrick A. Moran*
Mary Lou Steptoe
Fredric A. Smith
SIMPSON & MORAN, P.C.
555 South Woodward
Fifth Floor
Birmingham, Michigan 48011
Telephone: (313) 642-2000

Attorneys for Petitioner
**Counsel of Record*

Of Counsel:

Donald F. Turner
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 662-9115

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